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MILITARY LAW

REVIEW

VOL. 62

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MILITARY LAW REVIEW

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COMMAND RESPONSIBILITY FOR WAR CRIMES*

By Major William H. Parks **

An historical and comparative analysis of war crimes trials involving command responsibility in order to determine the standards of conduct required of a military commander in combat with regard to the prevention, investigation, reporting, and prosecution of war crimes. The author includes as part of his examination a view of the criminal responsibility of the combat commander, possible offenses, and the degree of intent required under both domestic and international law.

I. INTRODUCTION

The Vietnam conflict and the abberation which occurred in the subhamlet of My Lai (4) in Song My Village, Quang Nai Province, in the Republic of South Vietnam on March 16, 1968, reawakened questions concerning the responsibility of a military commander for the unlawful acts of his subordinates.¹ For some, it constituted an opportunity to re-assert theories of responsibility previously argued and rejected by courts of law;² others saw it

* This article is adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author was a member of the 21st Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ See, e.g., *The Clamor Over Calley: Who Shares the Guilt?* TIME, April 12, 1971, at 14; *Who Else is Guilty?* NEWSWEEK, April 12, 1971, at 30; Sheehan, *Should We Have War Crimes Trials?*, Seattle Post-Intelligencer, April 11, 1971, at 17, col. 5. See generally T. TAYLOR, NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY (1970); S. HERSH, MY LAI 4 (1970) and R. HAMMER, ONE MORNING IN THE WAR (1970).

² Telford Taylor, chief prosecutor in the *High Command Case*, discussed *infra* p. 38 *et seq.*, argued (unsuccessfully) for a theory of strict liability of a commander (XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 [hereinafter "TWC"] 544 [1948]; the argument is renewed in *Nuremburg and Vietnam*,

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as yet another way to indict the nation's leaders, and particularly the military, for the United States' involvement in Vietnam.³ It is not the intent of this article to rebut these arguments, as this has already been done by others.⁴ Rather it is intended to examine the standards of responsibility previously applied in order to ascertain the existing standards, municipal and international, and to determine if an identical municipal-international standard is feasible.

A. DEVELOPMENT OF THE CONCEPT—PRE-1945

The concept of command responsibility—and the commensurate duty of a commander to control his troops—was developed along two paths, not reaching fruition *per se* until delineated by the post-World War II tribunals. The first path dealt with the question of the general responsibility of command; the second, with the specific criminal responsibility of the commander. It is alternatively submitted that (a) the natural development of the former would lead to inevitable inclusion of the latter, and (b) there was in fact an intertwining of the development of the two from the outset. It is further submitted that the development of an international standard was incidental in nature, occurring only where states manifested such conduct as to make it apparent that no

supra note 1, at 180-181, and in an interview on the Dick Cavett Show on January 8, 1971, as reported by Neil Sheehan in the New York Times, January 9, 1971, at 3, col. 1. In that interview Professor Taylor opined that if one were to apply to Secretary of State Dean Rusk, Secretary of Defense Robert S. McNamara, Presidential advisors McGeorge Bundy and W. W. Rostow, President Lyndon B. Johnson, and General William C. Westmoreland the same standards of command responsibility as were applied in the trial of General Tomoyuki Yamashita in 1945, discussed *infra*, "there would be a strong possibility that they would come to the same end as he did." General Yamashita was found responsible for war crimes committed by his subordinates and hanged on February 23, 1946. A. Frank Reel, one of General Yamashita's defense counsel and author of a book relating the defense view of the case (THE CASE OF GENERAL YAMASHITA, 1949), has been similarly quoted, as noted in D. BERGAMINI, JAPAN'S IMPERIAL CONSPIRACY at 1112, n.5 (1972).

³ See, e.g., CRIMES OF WAR (R. Falk, G. Kolko, and R. Lifton, eds., 1971); and WAR CRIMES AND THE AMERICAN CONSCIENCE (E. Knoll and J. McFadden, eds., 1970).

⁴ See Solf, A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy, 5 AKRON L. REV. 43 (1972); DEPARTMENT OF THE ARMY, Final Report of the Research Project: Conduct of the War in Vietnam (1971); Paust, My Lai and Vietnam: Norms, Myths, and Leader Responsibility, 57 MIL. L. REV. 99 (1972); Hart, Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised, XXV NAVAL WAR COLLEGE REVIEW 19 (1972); and Paust, XXV NAVAL WAR COLLEGE REVIEW 103 (1973).

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satisfactory municipal standard was to be applied, and the other parties to the conflict were in a position to impose what was considered to be an appropriate international standard on culpable commanders of the offending state.⁵ When such an international tribunal was conducted, it generally followed the municipal standard of responsibility of the convening state.⁶

Sun Tzu, in what is considered to be the oldest military treatise in the world, wrote in 500 B.C.:

When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes.⁷

⁵ In a report issued October 28, 1953, the U.S. Army disclosed that in June, 1953, thirty-four war crimes cases arising out of the Korean conflict were ready for trial, but that the alleged perpetrators had to be released in the prisoner exchange following the armistice (July 27, 1953) in that conflict, GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 30, n. 82 (1959). Thus even where a state may legally detain and try prisoners of war for war crimes (as is recognized by Articles 85, 115, and 119 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949), this right may be forfeited by the terms of armistice between the conflicting states. Only where there is a clear "winner" and "loser" is there likelihood of international war crimes trials. In the Korean and Vietnam wars, it was apparent that the Communist states had no intention of punishing those commanders responsible for the commission of war crimes; and by the terms of the respective peace agreements between the parties and the circumstances of execution of those agreements, their adversaries were incapable of imposing sanctions upon those commanders, even where they were within the control of the Free World states. In the India-Pakistan-Bangladesh conflict, where military success was more readily defined, Bangladesh was ultimately persuaded by India to postpone its plans to try 195 Pakistanis accused of war crimes in the interest of "fulfilling a larger vision of harmony and peace in the (Indo-Pakistani) subcontinent." The Bangladesh insistence of trial of the 195 accused was considered the "most crucial point" in negotiations during the twenty months between cessation of hostilities and conclusion of the peace accord. Simons, *Bangladesh Divided Over Issue of War Crimes Trials*, Wash. Post, August 17, 1973, at p. A22, col. 1. Ratzin, *Pakistan, India Set Accord*, Wash. Post, August 29, 1973, at p. 1, col. 8; and *India to Release 90,000 Pakistanis in Peace Accord*, N. Y. Times, August 29, 1973, at p. 1, cols. 7, 8. This dilemma has been the rule more than the exception, and has been offered as explanation in part for the dearth of international war crimes trials prior to the unconditional surrender of World War II. Gross, *The Punishment of War Criminals*, 11 NETHERLANDS I. L. REV. 356 (1955) as cited in Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 MIL. L. REV. 99 at 111, fn. 38 (1972).

⁶ This was advocated by Polish legal scholar Manfred Lachs in 1945 in *War Crimes: An Attempt to Define the Issues*, and generally followed by all Tribunals, e.g., the Soviet Union utilized exclusively the Soviet concept of criminal negligence in defining command responsibility. U.S. DEPARTMENT OF THE ARMY, *Prisoner of War Study* (Step Two: The Functioning of the Law [VIII National Attitudes and Legal Standards 22]), 1969 (hereinafter cited as the "Harbridge House Study").

⁷ S. TZU, *THE ART OF WAR* 125 (S. Griffith transl. 1963).

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Recognizing the responsibility of the commander, he also recognized the correlative duty of the commander to control his subordinates. Upon publication of his principles of war, Sun Tzu was summoned before a leading warrior king and asked to submit his theories to a test; Sun Tzu consented. Two companies of women, untrained in military matters, were formed up and each placed under the command of one of the king's favorite concubines. They were armed and given cursory instruction in the then-current manual of arms and close order drill. Then, to the sound of drums, Sun Tzu gave the order, "Right turn!" The only response of the "companies" was one of laughter. Sun Tzu remarked: "If the words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame."

Again uttering the same command and receiving the same response, Sun Tzu then declared:

If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame. But if his orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers.

So saying and much to the consternation of the warrior king, Sun Tzu ordered the two company commanders beheaded and replaced by a member of each company. The execution was viewed by all, the drum was again sounded for drill, and the companies thereafter executed all maneuvers with perfect accuracy and precision, never venturing to utter a sound.⁸

The concept of national—and criminal—responsibility was recorded at an early date, Grotius declaring "... a community, or its rulers, may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it."⁹

While Grotius' statement on its face limits itself to national responsibility rather than addressing the liability of the individual military commander, international recognition of the latter occurred as early as 1474 with the trial of Peter von Hagenbach. Brought to trial by the Archduke of Austria on charges of murder, rape, perjury and other crimes against "the laws of God and man," Hagenbach was tried by an international tribunal of twenty-eight judges from allied states of the Holy Roman Empire.

⁸ S. TZU, *THE ART OF WAR* 9 (L. Giles Transl. 1944).

⁹ II GROTIUS, *DE JURE BELLI AC PACIS* 523 (C.E.I.P. ed., Kelsy trans. 1925).

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Despite a plea of superior orders, Hagenbach was convicted, deprived of his knighthood for crimes which he as a knight was deemed to have a *duty* to prevent, and executed. While an "international" trial, his trial in theory was not a "war crimes" trial as no state of war existed at the time of the commission of the offenses, the Swiss-Burgundian war not occurring until 1476.¹⁰

In 1621 King Gustavus Adolphus of Sweden promulgated his "Articles of Military Lawwes to be Observed in the Warres," Article 46 of which in part provided: "No Colonel or Captaine shall command his souldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges . . ."

In 1689, after unsuccessful seige of Calvinist Londonderry, Count Rosen was sternly reprobated and relieved from all further military duties by the exiled James II—not for failure to accomplish his mission, but for his outrageous seige methods, which included the murder of innocent noncombatants.¹¹

On April 5, 1775, the Provisional Congress of Massachusetts Bay adopted the Massachusetts Articles of War. The eleventh article provided:

*Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.*¹²

Article XII of the American Articles of War, enacted June 30, 1775, contained the same language. The provision was re-enacted as section IX of the American Articles of War of 1776 on September 20, 1776. Thus from the very outset of this nation, there was imposed upon the military commander the duty and responsibility for control of the members of his command.

¹⁰ Solf, *supra* note 4 at 65, and Paust, *supra* note 4 at 57 MIL. L. REV. 112 (1972).

¹¹ Hargreaves, *The Rule Book of Warfare*, MARINE CORPS GAZETTE, August 1970, at 44.

¹² Emphasis supplied. Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775.

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In promulgating the Articles of War of 1806, the provision was re-enacted, this time however authorizing specific punishment of the offending commander by cashiering, if deemed appropriate.¹³ In addition, Article 33 provided:

When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or in behalf of, the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall willfully neglect, or shall refuse upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.¹⁴

At approximately the same time, Napoleon I re-emphasized the responsibility of the commander in the briefest maxims: "There are no bad regiments; there are only bad colonels."¹⁵

During the War of 1812, American soldiers needlessly burned some buildings near their encampment in Upper Canada. Their commanding officer was summarily dismissed from the service. Another commander was brought before a United States military tribunal for a similar occurrence at Long Point.¹⁶

During the Black Hawk War of 1832, militia captain Abraham Lincoln was convicted by a court-martial for failure to control his men, some of whom had opened the officers' supply of whiskey and partaken freely thereof, while others were inclined to straggle on the march. Captain Lincoln was sentenced to carry a wooden sword for two days.¹⁷

In 1851 the United States Supreme Court affirmed a lower court's decision finding Colonel David D. Mitchell responsible for illegal acts which occurred during the Kearney campaign into Mexico in 1846. Colonel Mitchell had received illegal orders from his immediate superior which he had passed on to his subordinates

¹³ Articles of War, Article 32 (1806).

¹⁴ Articles of War, Article 33 (1806).

¹⁵ R. HEINL, *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 56 (1966).

¹⁶ Colby, *War Crimes*, 23 MICH. L. REV. 482, 501-02 (1925), as cited in Paust, *supra* n. 10 at 113.

¹⁷ C. SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS* 30 (1961).

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and in some cases personally carried into execution. Although the case concerned civil rather than criminal penalties, the conclusions reached with regard to certain principles of responsibility—*viz.* the execution or passing on of a patently illegal order, and the defense of superior orders—were exactly those prescribed almost a century later in the *Hostage* and *High Command* cases.¹⁸

In 1863, the United States promulgated General Order No. 100, better known as the Lieber Code. Article 71 thereof provided for punishment of any commander ordering or encouraging the intentional wounding or killing of an already "wholly disabled enemy," whether that commander belonged to the "Army of United States, or is an enemy captured after having committed his misdeed." Two years later, Captain Henry Wirz, Swiss doctor and Commandant of the Confederate prisoner of war camp at Andersonville, Georgia, was convicted by military commission and hanged for violation of the Lieber Code, having ordered and permitted the torture, maltreatment, and death of Union prisoners of war in his custody.¹⁹ Winthrop in his *Military Law and Precedents* makes reference to other post-Civil War investigations, concluding that the burning of Columbia, South Carolina, on February 17, 1865, ". . . cannot fairly be fixed upon any responsible commander. . . ." ²⁰ for lack of evidence and interceding factors.

In 1873 in the course of hostilities in Northern California six Modoc indians, including Captain Jack, the chief, were tried by military tribunal for the murder of Brigadier General Canby and Reverend E. Thomas, who as peace commissioners had entered the Modoc village under a flag of truce. All were convicted and sentenced to hang. The sentences of the principal perpetrators and Captain Jack were affirmed, the latter for ordering the murders. In affirming those sentences, the Attorney General of the United States observed:

All the laws and customs of civilized warfare may not be applicable to an armed conflict with the Indian tribes upon our Western frontiers, but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation

¹⁸ *Mitchell v. Harmony*, 54 U.S. (13 How.) 420 (1851). The plaintiff received a judgment against Colonel Mitchell personally of \$90,806.44 for seizure of plaintiff's goods not justified by military necessity. See *Infra*, text at footnotes 120 and 195.

¹⁹ THE TRIAL OF CAPTAIN HENRY WIRZ, 8 AMERICAN STATE TRIALS 666 (1865), as cited in THE LAW OF WAR: A DOCUMENTARY HISTORY 783 (L. Friedman ed. 1972).

²⁰ Emphasis supplied. WINTHROP, MILITARY LAW AND PRECEDENTS 782 n. 46 (2nd ed. 1895).

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of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baneness and treachery of their act.²¹

On June 22, 1874, the American Articles of War were repromulgated, Article 54 repeating the previous provisions concerning command responsibility. Winthrop in 1886 further defined the duty of the commander in armed conflict, providing some overlap between the responsibility of the military commander as stated in the Articles of War and the obligations of the laws of war:

The observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy's country.

All officers or soldiers offending against the rule of immunity of non-combatants or private persons in war forfeit their right to be treated as belligerents, and together with civilians similarly offending, become liable to the severest penalties as violators of the laws of war.²²

Elsewhere, he re-emphasized this point:

It is indeed the chief duty of the commander of the army of occupation to maintain order and the public safety, as far as practicable without oppression of the population, and as if the district were a part of the domain of his own nation.²³

With the deployment of United States forces to the Philippine Islands in 1901, United States forces met the question of the trial of foreign combatants for war crimes head on. By General Order No. 221, Headquarters, Division of the Philippines, August 17, 1901, insurrection First Lieutenant Natalio Valencia was tried, convicted, and sentenced to death for illegally ordering the execution of a non-combatant. By General Order No. 264 of that headquarters, September 9, 1901, Pedro A. Cruz, identified as a "leader" of guerrillas, was condemned to death for *permitting* the murder of two American Army prisoners of war in his custody.²⁴

²¹ 14 OPINS. ATT'Y GEN. 249 (1873), as cited in WINTHROP, *Id.* at 786, n. 78.

²² WINTHROP, *supra* n. 20 at 779 (footnote omitted).

²³ *Id.* at 800, (footnote omitted.) citing *Johnson v. McIntosh*, 8 Wheaton 581 (1821) which provides at 589: "A conquered people are not to be 'wantonly oppressed: . . .'" [Emphasis supplied].

²⁴ Brief for the Respondents in Opposition, In the Matter of General Tomoyuki Yamashita for Writs of Habeas Corpus and Prohibition, pp. 33-34. United States Supreme Court, October Term 1945 No. 61, Misc; No. 672. Also *In re* General Tomoyuki Yamashita, 327 U.S. 1 at 16, n. 3 (1946). These two orders were cited by the majority in recognizing the existence of "an affirmative duty" on the part of a commander who is additionally the commander of an occupied territory "to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population" of that occupied territory.

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In April, 1902, Brigadier General Jacob H. Smith, United States Army, was tried and convicted by general court-martial for inciting, ordering and permitting subordinates to commit war crimes during counterinsurgency operations on the island of Samar. In approving the conviction and sentence of dismissal, President Theodore Roosevelt stated:

The findings and sentence of the court are approved. I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands and of the well-nigh intolerable provocations it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve the employment of the sternest measures necessary to put a stop to such atrocities, and to bring this war to a close. It would be culpable to show weakness in dealing with such foes or to fail to use all legitimate and honorable methods to overcome them. But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates. Almost universally the higher officers have so borne themselves as to supply this necessary check; and with but few exceptions the officers and soldiers of the Army have shown wonderful kindness and forbearance in dealing with their foes. But there have been exceptions; there have been instances of the use of torture and of improper heartlessness in warfare on the part of individuals or small detachments. In the recent campaign ordered by General Smith, the shooting of the native bearers by the orders of Major Waller was an act which sullied the American name and can be but partly excused because of Major Waller's mental condition at the time; this mental condition being due to the fearful hardship and suffering which he had undergone in his campaign. It is impossible to tell exactly how much influence language like that used by General Smith may have had in preparing the minds of those under him for the commission of the deeds which we regret. Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong.²⁵

²⁵ S. Doc. 213, 57th Cong. 2nd Session, p.5. After learning of the widespread commission of war crimes by the insurrectionists — including torture and murder of all prisoners of war, mutilation of their bodies, murder of noncombatants, use of poison, and refusal to respect flags of truce— General Smith issued the following order to Major of Marines Littleton Waller Tazewell Waller, whose battalion had been deployed as part of General Smith's command:

I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please me. The interior of Samar must be made into a howling wilderness.

General Smith further instructed Major Waller to kill all persons capable of bearing arms, designating the lower age limit as ten years of age. In the next sixty days, Major Waller and his Marine expeditionary force through constant contact virtually destroyed a numerically superior enemy force without resorting to the illegal methods urged by General Smith. In January

Major Edwin F. Glenn, United States Army, was tried and convicted for violation of paragraph 16 of the Lieber Code, torture of a prisoner, for ordering use of the "water cure" and other means of torture as interrogation methods of prisoners taken during the Samar campaign.²⁶ Another Army officer, Captain Cornelius M. Brownell, was accused of ordering and directing the "water cure" interrogation of one Father Augustine de la Pena, who died while being so interrogated; Brownell escaped prosecution, however, as he had been released from the Army prior to discovery of the offense by higher authorities—a jurisdictional refrain which, through lack of Congressional action, returned to haunt the nation at the time of discovery of the My Lai offenses.²⁷

On October 18, 1907, the Fourth Hague Convention of 1907, respecting the laws and customs of war on land, was executed by forty-one nations. Article 1 of the Annex thereto laid down as a condition which an armed force must fulfill in order to be accorded

1902, however, the Marine force was beset by a number of problems, many of which were caused by the repeated treachery of that force's Filipino guides and bearers, who Major Waller discovered were plotting to massacre the entire Marine party. Feeling that his drastic situation called for drastic measures, Major Waller convened a drumhead court-martial of eleven Filipino bearers on January 20, 1902, of which he noted: "When I learned of the plot and heard everything, I sent [the bearers] out and had them shot." Major Waller maintained subsequently that the bearers were executed not only for their gross betrayal of the Marines, but in reprisal for the slaughter of Company C of the 9th Infantry at Balangiga, where Moro bolo-men had ripped open the entrails of butchered Army officers and poured in jam looted from the messhall.

General Chafee ordered Major Waller tried by general court-martial. Despite extreme command pressure, the court acquitted Major Waller. When General Chafee disapproved the acquittal, the Judge Advocate General of the Army disapproved the entire court-martial proceeding inasmuch as the Marine force had never been detached for service with the Army by Presidential order, as required by Sec. 1621, R.S. (1895) of the Articles of War. See also R. HEINL, *SOLDIERS OF THE SEA* 123-6 (1962); and J. SCHOTT, *THE ORDEAL OF SAMAR* (1964).

²⁶ S. Doc. 213, 57th Cong., 2nd Sess., pp. 20-28. The "water cure" method of interrogation consisted of the forcing of large quantities of water into the mouth and nose of the victim, which not only caused the victim to suffocate but served to severely distend the stomach; whereupon the interrogator(s) would strike the victim in the stomach or even jump on his abdomen.

²⁷ *Id.* at pp. 80-92. The offenses of Major Glenn and Captain Brownell were uncovered as the result of statements by former members of their respective commands—again a striking resemblance to My Lai. By letter of May 10, 1902, George B. Davis, Judge Advocate General of the Army, suggested to Senator H. Cabot Lodge that these jurisdictional defects be cured, a plea which has to this day gone unheeded. For a discussion of this point, see Paust, *After My Lai—The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

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the rights of a lawful belligerent, that it must be "commanded by a person responsible for his subordinates."²⁸ Similarly Article 19 of the Tenth Hague Convention of 1907, relating to bombardment by naval vessels, provided that commanders of belligerent fleets must "see to the execution of the details of the preceding articles" in conformance with the general principles of that Convention.²⁹ Article 43 of the Annex to the Fourth Hague Convention of 1907 further requires that the commander of a force occupying enemy territory "shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."³⁰ The latter principle was not unlike that advocated by Winthrop two decades previous; Hague Convention Four, it is submitted, is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander.

Article 54 of the 1916 Articles of War provided that a commander has a duty of insuring "to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or soldier under his command." General John A. Lejeune, thirteenth Commandant of the Marine Corps, reiterated the general responsibility of a commander in the 1920 *Marine Corps Manual*:

...officers, especially commanding officers, are responsible for the physical, mental, and moral welfare, as well as the discipline and military training of the young men under their command.³¹

At the conclusion of World War I, an international "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" met at Versailles. As part of their final report, delivered in March, 1919, the Commission recommended the establishment of an international tribunal "appropriate for the trial of these offenses (crimes relating to the war)."³² Part III thereof concluded that:

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including

²⁸ 36 Stat. 2277; Treaty Series No. 539; MALLOY TREATIES, VOL. II, 2269 (1910).

²⁹ 36 Stat. 2351 (1910).

³⁰ 36 Stat. 2277.

³¹ Marine Corps Manual, U. S. Marine Corps, 1920.

³² Committee on the Responsibility of the Authors of the War and on Enforcement of Penalties—Report Presented to the Preliminary Peace Conference, Versailles, March, 1919, Part IV.

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Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.³³

It is submitted that this resolution was predicated by two events unusual for the most part in the annals of warfare; (1) acts of war beyond normal public apprehension which shocked the conscience of the world, for example, the commencement of large-scale unrestricted submarine warfare, and (2) the virtually total defeat of Germany and her allies. This created a demand for retribution—perhaps to insure that this was indeed “the war to end all wars”—as well as the potential means for satisfying that demand in the form of the League of Nations.

Such was not to be, however, as some nations for individual reasons voiced reluctance for proceeding. The United States, through its representatives, Secretary of State Robert Lansing and international law scholar James Brown Scott, dissented from the proposed procedure of trial by international tribunal as it was without precedent; rather, any accused should be tried by military tribunals of the conquering nations which had “admitted competence” in the matter.³⁴ The Japanese delegation dissented from prosecuting

... highly-placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war [feeling] some hesitation [in admitting] a criminal liability where the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing acts in violation of the laws and customs of war.³⁵

Sweeping these objections aside, Articles CCXXVII and CCXXVIII of the Versailles Treaty demanded the trial of the Kaiser by international tribunal and persons accused of violating the laws of war by international military tribunals.³⁶

On February 3, 1920, the Allies submitted to the German government a list of 896 alleged war criminals they desired to try in accordance with Article CCXXVIII of the Versailles Treaty. The list including such high-ranking officers as the son of the Kaiser, Count Bismark (grandson of the Iron Chancellor), and Marshalls

³³ *Id.* as reported in 14 AM. J. INT. L. 95 (1920).

³⁴ *Id.* at Annex II.

³⁵ Greenspan, *supra* n.5 at 478, n.286.

³⁶ The accused was to be tried by a military tribunal of the nation which had jurisdiction over the offense(s) alleged; if more than one nation could claim jurisdiction, a multinational military tribunal was to be appointed.

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Von Hindenburg and Ludendorff. The German Cabinet strenuously objected, warning the Allies that Army leaders would resume hostilities if the demand was pressed. The German government advised the Allies that the Supreme Court of the Reich at Leipzig would conduct the trials and apply international rather than municipal law in trying the cases. The Allies consented on February 13, 1920, tendering to the Germans a list of forty-five names. The Germans eventually tried twelve of the forty-five, acquitting six. Of those convicted, only one was convicted on the basis of command responsibility. Major Benno Crusius was found guilty of ordering the execution of wounded French prisoners of war and sentenced to two years confinement.³⁷ In the "*Llandovery Castle*" Case, the German Supreme Court of Leipzig noted in their opinion that under their own Military Penal Code,

[I]f the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such order is alone responsible.³⁸

³⁷ The name of each accused ultimately tried, the charge, and the finding and sentence are as follows:

ACCUSED	CHARGE	FINDING	SENTENCE
Sgt. Karl Heymen	Mistreatment of POWs	Guilty	10 months
Capt. Emil Muller	Mistreatment of POWs	Guilty	6 months
Pvt. Robert Neumann	Mistreatment of POWs	Guilty	6 months
Lt. Capt. Karl Neumann	Torpedoing the hospital ship <i>Dover Castle</i>	Not Guilty	
1st Lt. Ludwig Dithmar	Firing on survivors in lifeboats of hospital ship <i>Llandovery Castle</i>	Guilty	4 years
1st Lt. John Boldt	Firing on survivors in lifeboats of hospital ship <i>Llandovery Castle</i>	Guilty	4 years
Max Ramdahr	Mistreatment of Belgian children	Not Guilty	
Major Benno Crusius	Ordering the Execution of POWs	Guilty	2 years
1st Lt. Adolph Laule	Murder of a POW	Not Guilty	
Lt. Gen. Hans von Schock	Mistreatment of POWs	Not Guilty	
Maj. Gen. Benno Kruska	Mistreatment of POWs	Not Guilty	
Lt. Gen. Karl Stenger	Ordering the execution of prisoners of war	Not Guilty	

U. S. DEPT OF ARMY, PAMPHLET No. 27-161-2, INTERNATIONAL LAW 221-222 (1962).

³⁸ Friedman, *supra* n. 19, 881.

The demands for international standards of responsibility by and large went unanswered and unheeded, as the world was to discover two decades later. The Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, promulgated in 1929, recognized in Article 26 that the commander had "the duty . . . to provide for the details of execution of the foregoing articles [of the Convention] as well as for the unforeseen cases."³⁹ Thus the belligerent states entered World War II with a custom of command responsibility, codified in large part by the Hague Conventions of 1907 and the 1929 Red Cross Convention, and with somewhat of a warning based on the essentially unfilled demands of the Versailles Treaty that concepts of command responsibility would be implemented at the conclusion of any future conflict.⁴⁰

Objections by the Allies to the leniency of the German trials at Leipzig, as well as the actions of Japan, such as their rape of Nanking in 1937, and German genocidal practices from the very outset and even prior to commencement of World War II, again shocked the conscience of the world, the two serving as catalytic impetus virtually from the outset of hostilities for

³⁹ 47 Stat. 2074 (1932).

⁴⁰ The concept of command responsibility was well recognized prior to World War II, even by the so-called "Oriental mind," as Marine General A. A. Vandegrift indicates in his autobiography, *ONCE A MARINE* (at p. 75). In 1928, then-Major Vandegrift was stationed with the Marine expeditionary force in China. He relates the following:

For a Christian general, Feng Yu-hsiang (the famous "Christian general" who baptized his troops en masse [with fire hoses] and had them sing hymns each night before retiring) proved an anomaly. As was the custom with Chinese forces, plainclothes agents preceded the main forces into the city. These men, generally cruel, plundered at will and treated the Chinese folk very harshly.

Soon after Feng's advance [to Tientsin], I learned that some of his agents were persecuting the natives in a small village close to one of our defense areas. After confirming the report I hastened to Feng's headquarters . . . he received me most courteously, explained that such acts were contrary to his orders, and promised to deal with the offenders if General [Smedley D.] Butler would let troops transit our area. Butler gave permission by telephone and I accompanied a platoon to the trouble spot. We caught the looters redhanded. Before I could say anything the Chinese platoon leader lined six of them up and beheaded them, an example to anyone else so tempted. The rest of them he marched back to the Chinese city, lined them against a wall and had them shot.

Japanese General Tomoyuki Yamashita testified at his trial (discussed *infra* n. 64) that he recognized and acknowledged the concept as a valid one, and one to which he maintained he adhered. *United States v. Gen. Tomoyuki Yamashita*, Tr. 3650, 3652, 3653, 3674.

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thoughts of the establishment of international tribunals for the conduct of war crimes trials once that conflict was concluded. Stories of the many atrocities committed by the German armies led representatives of many of the victimized states to issue the St. James Declaration in January, 1942, which promised to punish, "through the channels of organized justice," those responsible for war crimes.⁴¹ On March 9, 1943, the United States issued "solemn warnings" to the Axis powers that all those responsible for war crimes, either directly or indirectly, would be held accountable.⁴² In July, 1943, the United Nations War Crimes Commission was established to collect and collate evidence of war crimes. The Commission concerned itself primarily with such crimes as mistreatment of prisoners of war, atrocities against civilians, inhumane treatment of concentration camp inmates, execution of hostages, and other killing of noncombatants. On November 1, 1943, Great Britain, the United States, and the Soviet Union issued the Moscow Declaration on German Atrocities, which provided that those accused of war crimes would either be (a) "brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged," or (b) where offenses had no particular geographic localization, "punished by the joint decision of the Government of the Allies."

Formal protests to the Axis powers went unanswered; radio broadcast warnings went unheeded. On January 29, 1944, statements by United States Secretary of State Cordell Hull and British Foreign Secretary Anthony Eden were broadcast—and received by the Japanese—giving the details of the Bataan Death March. The United States also disclosed that the Japanese would not permit the United States Government to send food and supplies to United States and Filipino prisoners. Secretary Hull, in speaking of the treatment of prisoners of war in Japanese hands, stated:

According to the reports of cruelty and inhumanity, it would be necessary to summon the representatives of all the demons available anywhere and combine their fiendishness with all that is bloody in order to describe the conduct of those unthinkable atrocities on the Americans and Filipinos.⁴³

⁴¹ Friedman, *supra* n. 19, 778.

⁴² 89 Cong. Rec. 1773 (daily ed. March 9, 1943).

⁴³ Judgment of the International Japanese War Crimes Trial in the International-Military Tribunal for the Far East (hereinafter cited as "IMTFE") (1948), pp. 49, 748-750.

Secretary Eden in turn declared that the Japanese were violating not only international law but all human, decent civilized conduct. He warned the Japanese Government that in time to come the record of their military atrocities would not be forgotten. Secretary Hull closed his statement with the remark that the United States was assembling all possible facts concerning Japanese treatment of prisoners of war and that it intended to seek full punishment of the responsible Japanese authorities. Upon landing in the Philippines in October, 1944, General Douglas MacArthur issued warnings to the Japanese commanders that he would hold them immediately responsible for any failure to accord prisoners of war and civilians proper treatment. Like the Hull-Eden broadcast, General MacArthur's message was recorded in the Japanese Ministries.⁴⁴ On August 8, 1945, the Allies signed the London Agreement, establishing an International Military Tribunal for trial of war criminals whose offenses had no particular geographical location.⁴⁵ Jurisdiction for the trial of military commanders, as well as national leaders, was established in Article 6 of the Charter of the International Military Tribunal:

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction

⁴⁴ *Id.* at 749.

⁴⁵ Until execution of the London Agreement, Great Britain was of the mind that the German leaders should be considered wanted outlaws to be shot on sight, even if they voluntarily surrendered. Friedman, *supra*, n.19, p. 777.

Despite these preliminary moves, some international legal scholars throughout the war doubted the practicality of international war crimes trials. A. Berriedale Keith, in his seventh edition of *WHEATON'S INTERNATIONAL LAW* (1944) declared "[t]he idea of war crimes trials by neutral tribunals . . . fantastic, rather than practicable" (p. 242); and that ". . . the probability of anything effective being devised . . . is negligible" (p. 587). He also questioned whether individuals committing war crimes under order of their governments could be held liable for their actions (p. 586).

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of cities, towns or villages, or devastation not justified by military necessity;

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁴⁶

Individual states, in establishing military tribunals for trial of lesser officials accused of committing war crimes, promulgated comparable rules relating to the criminal responsibility of lesser commanders.

The initial United States definition, although never incorporated into any promulgating order, dealt both with direct commission of an offense and

... omission of a superior officer to prevent war crimes when he knows of, or is on notice as to their commission or contemplated commission and is in a position to prevent them.⁴⁷

Subsequently, each American theater of operations promulgated its own regulations for trial of war criminals. The commanders of the Pacific and China theaters issued orders which defined both subject jurisdiction and jurisdiction of the person:

5. OVER OFFENSES — a. The military commissions established hereunder shall have jurisdiction over the following offenses: murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offense within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offenses against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.⁴⁸

⁴⁶ Friedman, *supra* n. 19, 885.

⁴⁷ JCS Directive 1023/3, September 25, 1944, as cited in Douglass, *High Command Case: A Study in Staff and Command Responsibility*, INT'L LAWYER, 686, 687 (October 1972).

⁴⁸ United States Armed Forces, Pacific, *Regulations Governing the Trial of War Criminals* (24 September 1945); United States Armed Forces,

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Article 3 of the Law of August 2, 1947, of the Grand Duchy of Luxemborg, on the Suppression of War Crimes, reads as follows:

Without prejudice to the provisions of Articles 66 and 67 of the Code Penal, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present law: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided those crimes or delicts.⁴⁹

A special provision was made in the Netherlands relating to the responsibility of a superior for war crimes committed by subordinates. Article 27(a) (3) of the Law of July, 1947, adds, *inter alia*, the following provision to the Extraordinary Penal Law Decree of December 22, 1943: "Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment. . . ." ⁵⁰

Article 4 of the French Ordinance of August 28, 1944, "Concerning the Suppression of War Crimes," utilized for the trial of persons accused of war crimes within metropolitan France, Algeria, and the then-existing French colonies, provided:

Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have tolerated the criminal acts of their subordinates.⁵¹

Trials within Germany were all subject to Law No. 10 of the Allied Control Council ("Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity"). Article II(2) provided:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a [war] crime, . . . if he was (a) a principal, or (b) was an accessory to the commission of any such crime or ordered or abetted the same, or (c) he took a consenting part therein . . .⁵²

Article IX of the Chinese Law of October 24, 1946, "Governing the Trial of War Criminals," states that:

China, Regulations (21 January 1946). The former were used in the trial of Generals Yamashita and Homma and in the *Jaluit Atoll Case*, *infra*, then superseded by the *Regulations Governing the Trials of Accused War Criminals* of December 5, 1945, for all subsequent trials.

⁴⁹ United Nations War Crimes Commission, *IV LAW REPORTS OF TRIALS OF WAR CRIMINALS* 87 (hereinafter cited as "—L.R.T.W.C.—") (1948).

⁵⁰ *Id.*, 88

⁵¹ III L.R.T.W.C. 94.

⁵² I TWC XVI.

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Persons who occupy a . . . commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.⁵³

Article 8(ii) of the British Royal Warrant relating to the trials of persons accused of the commission of war crimes provided:

Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime . . .⁵⁴

The Canadian rules expanded this point, incorporating British rule 8(ii), then providing in their Rule 10:

(4) Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

(5) Where there is evidence that a war crime has been committed by members of a formation, unit, body, or group and that an officer or non-commissioned officer was present at or immediately before the time when such offense was committed, the court may receive that evidence as *prima facie* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime.⁵⁵

B. SUMMARY

Command has always imposed responsibility; yet few instances are recorded prior to the end of World War II where that responsibility was either criminal or international in nature. The responsibility existed prior to that time, but there was not sufficient warrant or authorization to interfere in what was essentially an area of "state action." The frustrations with the Leipzig trials after World War I, the genocidal acts of the Axis, and the absolute cessation of any form of government in the defeated Axis states, gave the world both the cause and the means for demanding a day of reckoning.

⁵³ IV L.R.T.W.C. 88.

⁵⁴ I L.R.T.W.C. 108-9. Article 139 (b), UCMJ (10 U.S. Code § 939(b)), relating to redress of injuries to property similarly provides that where such injuries are committed by a unit and the individual perpetrators cannot be identified, damages may be assessed against all individual members of the command who are shown to have been present at the time the damages complained of were inflicted.

⁵⁵ IV L.R.T.W.C. 128.

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Based on the foregoing rules, the Allied nations entered the trials believing a commander to be responsible for the unlawful actions of his subordinates where (a) he personally ordered the illegal act charged, or (b) with knowledge that such actions were taking place, he failed in his duty as a commander to prevent such offenses, either intentionally (The Netherlands, France, and Luxembourg) or through neglect (United States, China, Great Britain and Canada).⁵⁶ It remained for the tribunals to apply those rules to the cases presented.

II. WORLD WAR II TRIALS

A. "WAR CRIMES" DEFINED

Before proceeding, the term "war crimes" as used generally and in this thesis warrants definition. The United States Army defines "war crimes" as "the technical expression for a violation of the law of war by any person or persons, military or civilian."⁵⁷ The present British definition is similarly imprecise.⁵⁸

Field Manual 27-10 provides some delineation by including those acts defined by the Geneva Conventions of 1949 as "grave breaches," if committed against persons or property protected by those Conventions;⁵⁹ Paragraph 504 includes other acts as "representative" of war crimes, *viz.*:

⁵⁶ The requirement of knowledge presents itself by implication only in all but the United States JCS definition (*supra*, n. 47), which included knowledge or notice.

⁵⁷ U.S. DEPT OF ARMY, FIELD MANUAL NO. 27-10, LAW OF LAND WARFARE, para. 499 (1956) [hereinafter cited as FM 27-10].

⁵⁸ British War Office, III MANUAL OF MILITARY LAW (LAW OF WAR ON LAND, 1958), para. 624, defines "war crime" as "the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians."

⁵⁹ Paragraph 502 provides:

502. Grave Breaches of the Geneva Conventions of 1949 as War Crimes.

The Geneva Conventions of 1949 define the following acts as "grave breaches," if committed against persons or property protected by the Conventions:

a. GWS and GWS Sea:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (GWS, art. 50; GWS Sea, art. 51.)

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- a. Making use of poisoned or otherwise forbidden arms or ammunition.
- b. Treacherous request for quarter.
- c. Maltreatment of dead bodies.
- d. Firing on localities which are undefended and without military significance.
- e. Abuse of or firing on the flag of truce.
- f. Misuse of the Red Cross emblem.
- g. Use of civilian clothing by troops to conceal their military character during battle.
- h. Improper use of privileged buildings for military purposes.
- i. Poisoning of wells or streams.
- j. Pillage or purposeless destruction.
- k. Compelling prisoners of war to perform prohibited labor.
- l. Killing without trial spies or other persons who have committed hostile acts.
- m. Compelling civilians to perform prohibited labor.
- n. Violation of surrender terms.⁶⁰

The United States Navy has defined war crimes

... as those acts which violate the rules established by customary and conventional international law regulating the conduct of warfare. Acts constituting war crimes may be committed either by members of the armed forces of a belligerent or by individuals belonging to the civilian population.⁶¹

The Charter of the International Military Tribunal established by the Allied Powers at the conclusion of World War II for

b. GPW

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great sufferings or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention. (GPW, art. 130.)

c. GC.

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (GC art. 147.)

⁶⁰ FM 27-10 para. 504 (1956).

⁶¹ U.S. DEPARTMENT OF THE NAVY, LAW OF NAVAL WARFARE, para. 320 (NWIP 10-2, 1955).

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prosecution and punishment of the major war criminals of the European axis defined "war crimes" as:

. . . namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity . . .⁶²

The definition formulated by the United Nations in the Nuremberg Principles of 1946 is similar in language. France in contrast left the term undefined, feeling that any offenses to be punished were such infractions of French law as were not made justifiable by the laws and customs of war.⁶³ This is not unlike the Navy definition and the general definition, rather than specific definition, would seem to be preferred: a war crime is any act not justified by military necessity and otherwise prohibited by custom or international convention regulating the conduct of war.

B. THE TRIAL OF GENERAL TOMOYUKI YAMASHITA⁶⁴

Of the trials which address the question of command responsibility, the trial of Japanese General Tomoyuki Yamashita by Military Commission remains the most controversial, primarily (a) because of an ill-worded opinion prepared sua sponte by the lay court; (b) because of a book written by one of General Yamashita's defense counsel; and (c) inasmuch as it was one of the first war crimes trials completed, it gained the benefit of judicial review by the United States Supreme Court.

General Tomoyuki Yamashita served as commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands from October 9, 1944, until his surrender on September 3, 1945.⁶⁵ As such, the evidence established conclusively that he was the commander of all Japanese forces in the

⁶² CHAPTER II, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Article VI (b).

⁶³ III L.R.T.W.C. 105.

⁶⁴ Unless otherwise noted, all facts recited herein or documents referred to are from the record of trial, *United States of America vs. Tomoyuki Yamashita*, a Military Commission appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces, Western Pacific, dated 1 October 1945. [hereinafter referred to as Tr. —].

⁶⁵ Stipulation, October 29, 1945, between the United States and Tomoyuki Yamashita.

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Philippines.⁶⁶ He served concurrently as the military governor of the Philippines.⁶⁷

On October 2, 1945, General Yamashita was served with the following Charge:

Tomoyuki YAMASHITA, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its allies and dependencies, particularly the Philippines; and he, General Tomoyuki YAMASHITA, thereby violated the law of war.⁶⁸

On October 8, 1945, as a result of a motion made by the defense during arraignment of the accused,⁶⁹ the prosecution submitted

⁶⁶ By stipulation (*Id.*) General Yamashita agreed that in addition to his regular forces he commanded the Kempei Tai (military police). General Yamashita claimed that the naval troops in Manila were only under his tactical command and therefore not within his disciplinary command and control (Tr. 3622); his chief-of-staff, General Muto, testified that any officer having command of troops of another branch under him did have the authority and duty to restrain those men from committing wrongful acts (Tr. 3049, 4034). The Commission, in their findings, concluded "... [t]hat a series of atrocities and other high crimes have been committed by members of the Japanese armed forces *under your command*." [Emphasis supplied]. If these naval forces were not under Yamashita's command and control, they had to be under the command and control of Admiral Soemu Toyoda, Commander-in-Chief of the Combined Fleet. Admiral Toyoda's case is discussed, *infra* page 69, charged with criminal responsibility for the war crimes committed by the naval troops in question in Manila, the tribunal before which he was tried, in acquitting Admiral Toyoda, concluded that command, control, and responsibility for these forces lay in General Yamashita, not Admiral Toyoda. (Toyoda transcript, page 5012). The Japanese air Forces in the Philippines came under General Yamashita's command and control on January 1, 1945 (Yamashita transcript, p. 3589). He was also commander of all Prisoner of War Camps in the Philippines (Tr. 2675, 3251, 3252.)

⁶⁷ *In re Yamashita*, 327 U.S. 1 at 16 (1946).

⁶⁸ Tr. 23. The government of Japan was bound by a number of conventions to observe the rules and customs of land warfare. It had been a signatory of the Hague Convention No. IV of 1907 (Respecting the Laws and Customs of War on Land) and the Red Cross Convention of 1929 (Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field), and at the outbreak of the war, had agreed to apply the Red Cross Convention of 1929 to civilian internees. Although it had not ratified the Geneva Convention of 1929 (Treatment of Prisoners of War), upon the outbreak of war Japan had agreed to apply the provisions of that Convention *mutatis mutandis* and to take into consideration the national and racial customs of prisoners.

⁶⁹ Tr. 34.

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a Bill of Particulars containing sixty-four specifications, prefaced by the statement that

Between 9 October 1944 and 2 September 1945, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the Accused committed the following: . . .⁷⁰

Subsequently, on October 29, 1945, a Supplemental Bill of Particulars was filed containing an additional fifty-nine specifications, prefaced by the allegation that

. . . members of the armed forces of Japan, under the command of the Accused, were permitted to commit the following during the period from 9 October 1944 to 2 September 1945 at Manila and other places in the Philippine Island: . . .⁷¹

Trial on the merits commenced on October 29, 1945, concluding December 7, 1945, after hearing 286 witnesses and receiving 423 documents in evidence.⁷² The evidence substantially supported the crimes alleged in most of the 123 particulars; General Yamashita admitted neither the commission of the acts nor that they were violations of the laws of war.⁷³ Rather, he denied ordering the offenses alleged, and denied having any knowledge of their commission, the latter as a result of the extreme tactical situation in which he found himself from the very outset of assumption of command.⁷⁴ Had he known of or foreseen these acts, he would have concentrated all of his efforts toward preventing them.⁷⁵ In concluding his testimony, General Yamashita specifically denied either receiving from superior authority or giving any order to massacre "all the Filipinos."⁷⁶

⁷⁰ Tr. 37.

⁷¹ Tr. 74.

⁷² Tr. 4058.

⁷³ Tr. 3917 *et seq.*; United States v. Yamashita, 327 U.S. 1 at 14.

⁷⁴ Tr. 3537, 3654-6.

⁷⁵ Tr. 3656.

⁷⁶ Tr. 3656. David Bergamini, in JAPAN'S IMPERIAL CONSPIRACY (1972) indicates Japanese records are to the contrary. General Yamashita's subordinates received such a directive from Tokyo Imperial Headquarters and carried it out despite General Yamashita's efforts to prevent its execution. (pp. xxii, 1111-1112) If this is true, the Yamashita case factually resembles the situation presented in the war crimes trial of Generalfeldmarschall Wilhelm von Leeb. On receipt of The Commissar Order, General von Leeb called his subordinate commanders together, advised them that he considered that order to be in violation of international law, and advised them of his opposition to it. As the court stated in acquitting him of charges relating to its subsequent implementation, "If his subordinate commanders . . . permitted . . . enforcement, that is their responsibility and not his." U.S. v. Von Leeb, XI TWC 557-558, discussed *infra* p. 44 *et seq.* The so-called "Yam-

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The evidence presented the Commission directly and circumstantially refuted the testimony of General Yamashita, the latter on five bases: (a) the number of acts of atrocity, (b) the number of victims, (c) the widespread occurrence of atrocities, (d) the striking similarity in the method of execution, and (e) the vast number of atrocities carried out under the supervision of an officer.

Of the 123 atrocities included within the Charge, evidence was adduced on ninety.⁷⁷ Forty-four occurred in Manila substantially during the two-week period from 6 to 20 February 1945, during which time over 8,000 men, women, and children, all unarmed noncombatant civilians, were killed and over 7,000 mistreated, maimed or wounded.⁷⁸ While General Yamashita had displaced his headquarters from Manila some two months previous, and while communications were generally precarious, his headquarters nevertheless possessed and utilized the capability of communication with Manila until June, 1945.⁷⁹ The war crimes which occurred in Manila were carried out pursuant to written orders⁸⁰ and under the supervision of officers of the army and navy.⁸¹ Many advised their victims-to-be that they were acting pursuant to orders from higher authority.⁸² A pattern of execution and an

ashita doctrine" of strict liability, as argued and asserted by chief prosecutor Telford Taylor, was specifically rejected by the Tribunal in the *von Leeb* case. XI TWC 534-44. One can only speculate as to what success General Yamashita may have had proffering this argument (assuming *arguendo* Bergamini is correct) rather than asserting the improbable denial of knowledge.

⁷⁷ Annex to the Review of the Theater Judge Advocate, United States Army Forces, Pacific (December 26, 1945).

⁷⁸ Tr. 212, 271, 348, 370, 412, 429, 445, 587, 606, 669, 717, 743, 778, 806, 871, 1147, 1159, 1197, 1200, 1222, 1262, 1270, 1299, 1370, 2211, 2223. Annex, *id.* items 3, 10, 13, 15, 15, 17, 20, 23, 24, 25, 27, 28, 29, 30, 32, 34, 35, 36, 41, 48, 50, 51, 52, 53, 60, 61, 62, 63, 64, 68, 77, 80, 88, 89, 93, 97, 98, 99, 101, 102, 104, 105.

⁷⁹ Tr. 3524-3527, 3654-3656, 3123, 3387, 2674.

⁸⁰ An order of the Kobayashi Heidan group dated 13 February 1945 directed that all people in or around Manila except Japanese and Special Construction Units (Filipino collaborators) be executed (Tr. 2905, 2906; Ex. 404). An operations order of the Manila Naval Defense Force and Southwestern Area Fleet, part of the landbased naval forces, directed that in executing Filipinos, consideration was to be given to conserving ammunition and manpower; and that because the disposal of bodies was "troublesome" they should be gathered into houses which were scheduled to be burned or destroyed (Tr. 2909).

⁸¹ Tr. 833, 2174.

⁸² During the Paco massacre in Manila on February 10, 1945, in which twelve unarmed noncombatant civilians were executed (Annex, *supra* n. 64, item 29), a Japanese officer informed his intended victims, "You very good

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orderliness and dispatch emerged: assembly of the victims in a central location, usually a house or large building,⁸³ where the most "economical" means of execution were utilized in order to conserve the expenditure of ammunition.⁸⁴ In a number of instances extensive advance preparation of the site, for example, installing strings to set off explosives, cutting holes in the floor for bodies to fall through, digging mass graves, and staging gasoline for the burning of bodies and buildings, was made to facilitate executions.⁸⁵ The bodies were then disposed of by throwing in the river, burning with a house or building, or burying in mass graves.⁸⁶ Similar war crimes were documented throughout the Philippines, manifesting the same pattern of orderliness, planning, and direction for the most part during the same two-week period in February, 1945.⁸⁷ In addition, there was extensive evidence concerning the starvation, torture, lack of medical care for, and murder of American prisoners of war and civilian internees.⁸⁸ General Yamashita never inspected any of the prisoner of war camps, even though his headquarters was located within, adjacent to, or in the vicinity of two different camps where a substantial

man but you die," and "Order from higher officer, Kill you, all of you." (Tr. 833). At Dy Pac Lumber Yard in Manila on February 2, 1945, (Annex, *supra* n.64, items 16 and 93), before executing 117 noncombatant civilians, the Japanese captain in charge advised his victims that they were to die because of "an order from above" he had to follow. (Tr. 2174). Outside Manila, on April 10, 1945, during the murder of civilians near Sumayao, a Japanese soldier said "It was Yamashita's order to kill all civilians." (Tr. 2317). On Bataan Island, an American aviator was tortured, then buried alive. The commander of the execution party stated that the execution was carried out as a result of a direct order from General Yamashita that "American prisoners of war in the Philippine Islands will be killed." (Tr. 2609-12, 2616, 2621).

⁸³ Tr. 190, 410, 429, 450, 463, 587, 606, 715, 738, 767, 775, 797, 823, 2167; Ex. 131.

⁸⁴ Tr. 148, 192, 271, 283, 348, 405, 453, 587, 621, 717, 745, 779, 798, 833, 1134, 1197, 2151, 2168; Ex. 126.

⁸⁵ Tr. 445, 467, 477, 589, 669, 768, 778, 823, 2151, and 2268.

⁸⁶ 467, 607, 639, 768, 778, 806, 865, 1188, 1200, 1237, 2152; Ex. 91, 92, 93, 114, 124.

⁸⁷ Tr. 1491, 1506, 1515, 1524, 1533, 1546, 1556, 1621, 1628, 1647, 1652, 1655, 1661, 1671, 1707, 1710, 1714, 1736, 1737, 1739, 1764, 1775, 1783, 1799, 1813, 1839, 2182. On February 12, 1945, more than 2,500 men, women, and children of the town of Calamba on Luzon were executed by bayoneting or burning. (Tr. 1977, 1979, 1981, 1985, 1992, 1999, 2004, 2008, 2012.) On February 24, 1945, all male residents of San Pablo between the ages of 15 and 50 — some 6,000 to 8,000 in all — were executed (Tr. 2064, 2069, 2070, 2072, 2083, 2084, 2088).

⁸⁸ Annex, *supra* n. 64, items 2, 4, 6, 7, 9, 13, 69, 73, 76, 83, 86, 87, 89, 94, 95, 109, 122.

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number of violations occurred.⁸⁰ After General Yamashita personally ordered the suppression of guerilla activities in December, 1945, two thousand Filipinos incarcerated in Manila as guerrilla suspects were given cursory trials, none of which lasted more than five minutes and none of which even conformed to Japanese legal requirements, transported to North Cemetery in trucks, and beheaded.⁹⁰ General Yamashita's staff judge advocate, Colonel Hideo Nishiharu, testified that he advised General Yamashita that these guerrilla suspects were in custody, that there was insufficient time to give them proper trials, and that the Kempei Tai "would punish those who were to be punished."⁹¹ Knowing that this meant that these guerillas would be executed without trial, General Yamashita nodded in apparent approval.⁹² General Yama-

⁸⁰ Tr. 3537, 3573. General Yamashita's headquarters were at Fort McKinley until December 23, 1944, where four hundred disabled American prisoners of war were held from October 31, 1944 until January 15, 1945. The prisoners were crowded into one building, furnished no beds or covers and kept within the inclosure of a fence extending thirty feet beyond each side of the building. Their two meals a day consisted of one canteen cup of boiled rice, mixed with greens; once a week the four hundred men were given twenty-five to thirty pounds of rotten meat, filled with maggots. Occasionally they would go a day or two without water and at times were reduced to eating grass and sticks they dug in the yard. (Tr. 2756-2758). These conditions existed within walking distance of General Yamashita's headquarters; yet, while recognizing a duty to prevent such occurrences, and despite his testimony that had he foreseen or known of these conditions he would have "concentrated all [his] efforts toward preventing it," he never conducted nor directed the conduct of an inspection of the facilities. (Tr. 3654-3656). He transferred his headquarters to Baguio in 1945, where in one incident on April 18, 1945, eighty-three men, women, and children all noncombatants, were executed. (Tr. 2655-2661).

⁹⁰ Tr. 2253-2311.

⁹¹ Tr. 3762-3763.

⁹² Tr. 3762, 3763, 3814, 3815. Aware that Colonel Nishiharu's testimony directly connected General Yamashita to 2,000 deaths and generally weakened the defense argument of lack of knowledge, defense counsel A. Frank Reel did everything he could to discredit Colonel Nishiharu's testimony. Utilizing a little literary license and a pair of editing scissors, he met with greater success in his book *The Case of General Yamashita* (1949) than before the Commission. In his book, Reel asserts that the Commission, impatient with Colonel Nishiharu, conducted its own cross-examination, concluding:

The Commission doubts that further exploration of the point would serve any useful purpose. . . . We have great doubt that lengthy cross-examination will be worth consideration of this court.

To which Reel then added:

And that, I believe, disposed of Nishiharu.

A reading of the transcript lends itself to a different interpretation. A colloquy between the Commission and Reel indicates that any impatience of the Commission was with Reel and his line (and length) of cross-examination. After extensive cross-examination concerning Colonel Nishiharu's role in the decision-making process, particularly as it related to the execution of the 2,000 prisoners, the Commission interrupted:

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shita subsequently issued a written order to the Kempei Tai unit responsible for the executions commending them for their "fine work."⁹³

The answers will probably be quite immaterial, anyway. No commander could possibly be in a position where the recommendations by a staff officer, if accepted, would place the responsibility upon the staff officer. In all armies, it is presumed to be a standard practice that staff officers make recommendations to commanders, which may or may not be accepted, but if they are accepted then it becomes the decision of the commander; the staff officer's responsibility is finished.

(Tr. 3792).

Reel maintained he was merely attacking Colonel Nishiharu's credibility, and resumed his line of examination. His attempts were interrupted for clarification purposes by both government counsel and the Commission. Once the point in question — approval by the Commanding General of death sentences — was clarified by the Commission's questions, the Commission then advised Captain Reel. "You may proceed, and the Commission doubts that further exploration of this point would serve any useful purpose. Do you propose to explore it further?" (Tr. 3799)

While answering initially in the negative, Reel's subsequent explanation indicated that he in fact did intend to renew the same line of question. The Commission then replied:

Well, we have great doubt that lengthy cross examination will be worth consideration of the Court. It is entirely possible you may wish to explore into the details of the alleged execution of the one thousand or thereabouts Filipinos charged with being guerrillas, just before the headquarters was moved from Fort McKinley. I will ask you to consider very carefully the necessity of much more cross-examination of this witness.

(Tr. 3800)

Thereafter, rather than "disposing" of Colonel Nishiharu, Captain Reel continued his examination for another twenty-one pages.

The author's reading of the transcript is borne out by a conversation with the government counsel in the *Yamashita* trial, Major Robert M. Kerr, on November 23, 1972. Mr. Kerr thought the testimony of Colonel Nishiharu both significant and conclusive, believed the Commission accepted his testimony, and was in complete disagreement with Reel's conclusions concerning that testimony.

Colonel Nishiharu's testimony is supported by the testimony of Richard M. Sakakida (Tr. 2253-2302), a Nisei interpreter who worked in Colonel Nishiharu's office. Sakakida testified that during December 1944, trial of Filipino civilians consisted merely in the accused signing his name and giving his thumb-print, in reading the charge to him and in sentencing him. In the event a sentence of death was passed, the victim was not informed of this until arrival at the cemetery. In one week in December 1944, the cases of 2,000 Filipinos accused of being guerrillas were so handled by General Yamashita's headquarters. If Japanese soldiers were tried, however, they were accorded a full trial in accordance with Japanese procedures. No Japanese soldiers were tried after October 1944, however.

The testimony of Richard M. Sakakida was overlooked by Mr. Reel in *The Case of General Yamashita*.

⁹³ Tr. 905-906, 3763. The captured diary of a Japanese warrant officer assigned to a unit operating in the Manila area contained an entry

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Two other witnesses appeared on behalf of the prosecution to directly link General Yamashita to the offenses alleged. While both were in the custody of United States forces as suspected collaborators, and while both previously had offered to exchange information as to Filipino and Japanese collaborators in return for their freedom, both testified that they had received no promise or reward for their testimony in the trial of General Yamashita.⁹⁴

The first, Narciso Lopus, was private secretary from June 1942 to December 1944 to General Arsenio Ricarte, a prominent member of the Japanese puppet government of the Philippines. Lopus was advised by Ricarte in October 1944 that Yamashita had informed him that:

We take the Filipinos 100 percent as our enemies because all of them, directly or indirectly, are guerrillas or helping the guerrillas. In a war with the enemies [sic] we don't need to give quarter. The enemies should go.⁹⁵

According to Lopus, General Yamashita then advised Ricarte that he planned to allow the Americans to enter Manila; he would then counter-attack, destroying Manila, the American forces, and the population of Manila. His plan of defense coincided with orders he had received to destroy Manila, particularly the populated and commercial areas of the city. General Yamashita further advised General Ricarte that he had ordered Japanese forces to wipe out any population area that gave any signs of pro-American movement or action; and that when Ricarte asked General Yamashita to rescind the order, General Yamashita refused.⁹⁶

The second witness, Joaquin S. Galang, testified that he overheard a conversation between Generals Yamashita and Ricarte in December 1944 in which General Ricarte asked General Yamashita to rescind his order to kill all Filipinos. General Yamashita replied: "The order is my order. And because of that it should not be broken or disobeyed. It ought to be consumed, happen what may happen."⁹⁷

The testimony of Galang was rebutted by the defense: Galang had testified that General Ricarte's 12-year-old grandson had served as an interpreter for the conversation overheard by Galang;

dated December 1, 1944: "Received orders, on the mopping up of guerrillas last night. Our object is to wound and kill the men, to get the information and to kill the women who run away." (Tr. 2882; Ex. 385).

⁹⁴ Tr. 913, 1059.

⁹⁵ Tr. 917.

⁹⁶ Tr. 917, 923, 939, 940, 947, 1023.

⁹⁷ Tr. 1063, 1068, 1069.

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the defense produced the grandson, Bislumo Romero, who denied interpreting the conversation in question.⁹⁸

The trial concluded on December 7, 1945. In reaching a finding of guilty, the Commission, none of whom were lawyers, saw fit to issue a written opinion, which states in part:

The Prosecution presented evidence to show that the crimes were so extensive and wide-spread, both as to time and area, that they must have been wilfully permitted by the Accused, or secretly ordered by the Accused . . .

The Accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, FM 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principle considerations of the Commission during its deliberations. . . .

. . . The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.⁹⁹

Review of the evidence presented, the record of trial, and the Commission's "opinion" indicates four theories of command responsibility upon which the Commission could have depended to reach their decision: (1) that General Yamashita ordered the offenses committed; (2) that, learning about the commission of the offenses, General Yamashita acquiesced in them; (3) that, learn-

⁹⁸ Tr. 2014, 2021.

⁹⁹ Tr. 4059-4063.

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ing about the commission of the offenses, General Yamashita failed to take appropriate measures to prevent their reoccurrence or to halt them; (4) the offenses committed by the troops under General Yamashita were so widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

The question of knowledge, an element of the first three theories, was the subject of re-examination during the trial of General Yamashita's Chief of Staff, Lieutenant General Akira Muto. Tried by the International Military Tribunal for the Far East, a tribunal composed of lawyer-judges from eleven nations, Muto was charged with the same offenses as Yamashita; much of the evidence received was taken directly from the Yamashita transcript. Muto's defense to these charges was the same: lack of knowledge owing to the extreme tactical situation. In addressing this defense, the Tribunal stated:

. . . During his tenure of office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered. Muto shares responsibility for these gross breaches of the Laws of War. *We reject his defense that he knew nothing of these occurrences.* It is wholly incredible.¹⁰⁰

General Yamashita's case received daily review during the progress of the trial by the staff judge advocate for the convening authority.¹⁰¹ A daily summary of evidence was made and as a result the staff judge advocate's review of the case was completed on December 9, 1945. In conclusion, the staff judge advocate stated:

¹⁰⁰ II Tokyo Judgment 1, 186 [Emphasis supplied.]; Also see Volume 203, Official Transcript of the International Japanese War Crimes Trial, In The International-Military Tribunal for the Far East, pages 49, 820-49, 821. The specific count of the indictment, Count 55, contained language similar to that with which Yamashita was charged:

. . . being by virtue of (his) respective (office) responsible for securing the observance of the said Conventions and assurances and the Law and Customs of War . . . in respect of many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States . . . (and) the Commonwealth of the Philippines . . . deliberately and recklessly disregarded (his) legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war. (Count 55 of the Indictment, Annex No. A-6, Tokyo Judgment).

¹⁰¹ United States Army Forces, Western Pacific.

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The evidence affirmatively shows a complete indifference on the part of accused as commanding officer either to restrain those practices or to punish their authors. The evidence is convincing that the overall responsibility lay with the Army Commander, General Yamashita, who was the highest commander in the Philippines; that he was charged with the responsibility of defending the Philippines and that he issued a general order to wipe out the Philippines if possible and to destroy Manila; that subsequently he said he would not revoke the order.

The pattern of rape, murder, mass execution and destruction of property is wide spread both in point of time and of area to the extent a reasonable person must logically conclude the program to have been the result of deliberate planning.

From all the facts and circumstances of record, it is impossible to escape the conclusion that accused knew or had the means to know of the widespread commission of atrocities by members and units of his command; his failure to inform himself through official means available to him of what was common knowledge throughout his command and throughout the civilian population can only be considered as a criminal dereliction of duty on his part.¹⁰²

Defense counsel for General Yamashita had previously filed a petition for writs of habeas corpus and prohibition with the United States Supreme Court on November 25, 1945;¹⁰³ a petition for writ of certiorari was subsequently filed on January 7, 1946.¹⁰⁴ In the interim, the military continued its review process. On December 26, 1945, the review of the theater staff judge advocate was completed. After extensive review of the evidence, the theater staff judge advocate stated:

The only real question in the case concerns accused's responsibility for the atrocities shown to have been committed by members of his command. Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility [reciting facts]. All this leads to the inevitable conclusion that the atrocities were not the sporadic acts of soldiers out of control but were carried out pursuant to a deliberate plan of mass extermination which must have emanated from higher authority or at least had its approval. From the widespread character of the atrocities as above outlined, the orderliness of their execution and the proof that they were done pursuant to orders, the conclusion is inevitable that the accused knew about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators. Accused himself admitted that he ordered the suppression or "mopping up" of guerrillas

¹⁰² Review of the Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, Headquarters, United States Army Forces, Western Pacific, December 9, 1945.

¹⁰³ In the Matter of the Application of General Tomoyuki Yamashita. United States Supreme Court, October Term, 1945, No. 61, Miscellaneous.

¹⁰⁴ General Tomoyuki Yamashita, Petitioner, v. Lieutenant General Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific, United States Supreme Court, October Term, 1945, No. 672.

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and that he took no steps to guard against any excesses in the execution of this order. One cannot be unmindful of the fact that accused, an experienced officer, in giving such an order must have been aware of the dangers involved when such instructions were communicated to troops the type of the Japanese. Accused stoutly insists that he knew nothing of any of the atrocities and assigns as the reason for his lack of knowledge the complete breakdown of communications incident to the swift and overpowering advance of the American forces and to his complete preoccupation with plans for the defense of the Philippines. He states that his troops were disorganized and out of control, leaving the inference that he could not have prevented the atrocities even had he known of them. With respect to Manila, he insists that he had only tactical command of naval troops operating in the city and although he had authority to restrain such troops committing disorders, he could not discipline them, the situation being thus complicated by dual control between himself and the Navy. Here in particular the defense witnesses testified to a breakdown of communications with the forces in Manila. While, however, it may be conceded that the accused was operating under some difficulty due to the rapidity of the advance of the Americans, there was substantial evidence in the record that the situation was not so bad as stated by the accused. General Yokoyama admitted that he had communication with troops in Manila until 20 February and with the accused until June and made frequent reports to him. Surely a matter so important as the massacre of 8,000 people by Japanese troops must necessarily have been reported. (Since accused had authority to control the operations of the naval troops he cannot absolve himself of responsibility by showing that others had the duty of punishing them for disorders.) There is no suggestion as to any breakdown in communications with Batangas where late in February some of the most widespread atrocities occurred, nor is there any substantial proof that communications with other points in the islands at which atrocities occurred were at all interrupted. It is also noteworthy that the mistreatment of prisoners of war at Ft. McKinley occurred while accused was present in his headquarters only a few hundred yards distant and some of the other atrocities transpired close to the proximity of Baguio where he had his headquarters after removal from Manila. Taken all together, the court was fully warranted in finding that accused failed to discharge his responsibility to control his troops thereby permitting the atrocities alleged and was thus guilty as charged.¹⁰⁵

In re Yamashita was argued before the Supreme Court of the United States on January 7, 1945.

The substance of the Court's opinion ¹⁰⁶ addressed three issues: (a) jurisdiction of a military commission over the accused; (b) failure to state an offense against the law of war, that is, jurisdiction over the offenses; and (c) entitlement to and denial of the ac-

¹⁰⁵ Review of the Theater Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, General Headquarters, United States Army Forces, Pacific, December 26, 1945.

¹⁰⁶ *In re Yamashita*, 327 U.S. 1 (1945).

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cused's fundamental right of a fair trial thereby divesting the Commission of jurisdiction to proceed.

This article limits its discussion to (b)—was there such a duty imposed upon a military commander that its disregard constituted a violation of the law of war? In determining that the acts alleged stated an offense against the law of war, the Court first addressed the question of command responsibility:

... it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he *may be charged with personal responsibility for his failure to take such measures when violations result*. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect the civilian population and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.¹⁰⁷

Citing the provisions relative to command of Articles 1 and 43 to the Annex of the Fourth Hague Convention of 1907, Article 19 of the Tenth Hague Convention, and Article 26 of the Geneva Red Cross Convention of 1929,¹⁰⁸ the Court stated:

These provisions plainly imposed on petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.¹⁰⁹

In concluding that the charge stated an offense against the law of war, the majority, in refusing to review the evidence before the Commission, nevertheless noted:

¹⁰⁷ *In re Yamashita*, 327 U.S. 1, 14-15 (1945) [Emphasis supplied.].

¹⁰⁸ See text at notes 28, 29, 30, 39 and 40, *supra*.

¹⁰⁹ *In re Yamashita*, 327 U.S. 1, 16 (1945).

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There is no contention that the present charge, thus read, is without the support of evidence, or that the Commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances . . . It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the Commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

. . . we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the Commission had authority to try and decide the issue which it raised.¹¹⁰

The majority thus concluded (a) that a commander has a duty to control the conduct of his subordinates, insuring their compliance with the law of war, and (2) that where such a duty exists, a charge alleging less than personal participation in or ordering of an act in violation of the law of war states a violation of the law of war.

In a dissent laden with emotion, Justice Murphy charged:

. . . He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.¹¹¹

However, Justice Murphy conceded that "inaction or negligence may give rise to liability, civil or criminal,"¹¹² subsequently observing that "this is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities."¹¹³ Justice Murphy's objection was not to the standard of responsibility, but to the seeming inconsistency in the facts between the picture painted, first, of a thoroughly defeated commander, retaining operational command but having lost tactical control, under constant attack by vastly superior forces and, second, a commander who was not exercising proper administrative control over his subordinate units. This is a factual determina-

¹¹⁰ *Id.* at 17, 18. See also, n. 4 at 327 U.S. 1, 16.

¹¹¹ *Id.* at 28. See also, 327 U.S. 1, 47 (Justice Rutledge concurrence in this view).

¹¹² *Id.* at 39.

¹¹³ *Id.* at 40.

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tion balanced by the Commission and eventually determined adversely to the accused based on their professional opinion, as soldiers, that the accused failed to fulfill his duties as a commander as required by the circumstances.

It has been fairly speculated that the emotive dissents of Justices Rutledge and Murphy—manifested by the shaking voice and castigating looks of Justice Murphy in reading his dissent—came about as a result of the serious procedural questions raised by the case.¹¹⁴ Unable to accept the majority's logic on these points, the dissenting justices accepted all arguments of counsel for the accused.¹¹⁵ The respective petitions were denied, and the case was returned to the military for disposition on February 4, 1946, the date of the Court's decision.¹¹⁶

General Yamashita's fate lay in the hands of General Douglas MacArthur, Commanding General, United States Army Forces, Pacific. That decision came on February 7, 1946: General MacArthur approved the findings and sentence of the commission.¹¹⁷

¹¹⁴ KERR, *supra* n. 92.

¹¹⁵ Justice Murphy's opinion embraced all defense arguments *in toto* and in most cases verbatim; his famous language concerning General Yamashita's purported lack of knowledge (327 U.S. 1 at 34) comes directly from the brief filed with the Supreme Court by the defense (pages 28-29).

An independent source confirms that the dissenting Justices — indeed, the entire Court — were in disagreement over procedural questions only; no review of the merits was attempted. A. MASON, HARLAN FISKE STONE: *PILLAR OF THE LAW* (1956), 666-671.

¹¹⁶ Denial of Motion for Leave to File Petition for Writ of Habeas Corpus and Prohibition, Supreme Court of the United States, October Term, 1945, No. 61, Miscellaneous; and Denial of Petition for Writ of Certiorari, No. 672.

¹¹⁷ It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze.

Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and pur-

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and on February 23, 1946, General Yamashita was hanged.¹¹⁸

The value of the study of the Yamashita trial lies not in its often misstated facts nor in the legal doctrine of strict liability it purportedly espoused (but did not), but in the legal conclusions it actually reached. *Yamashita* recognized the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war; and it affirmed the *summum jus* of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own. In the latter it became the foundation for all subsequent trials arising from World War II. In the former its value lies primarily in the general rather than the spe-

poseless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.

It is appropriate here to recall that the accused was fully forewarned as to the personal consequences of such atrocities. On October 24 — four days following the landing of our forces on Leyte — it was publicly proclaimed that I would “hold the Japanese Military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and the protection to which they of right are entitled.

No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practice as immutable and as standardized as the most matured and irrefragable of social codes. The proceedings were guided by that primary rational of all judicial purpose — to ascertain the full truth unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge.

I approve the findings and sentence of the Commission and direct the Commanding General, United States Army Forces, Western Pacific, to execute the judgment upon the defendant, stripped of uniform, decorations and other appurtenances signifying membership in the military profession.

(signed) Douglas MacArthur
(typed) DOUGLAS MacARTHUR,
General of the Army, United States
Army, Commander-in-chief

Action of the confirming authority, General Headquarters, United States Army Forces, Pacific, in the case of General Tomoyuki Yamashita, Imperial Japanese Army, February 7, 1946.

¹¹⁸ Notification of Death, Office of the Surgeon, Headquarters, Philippine Detention & Rehabilitation Center, February 23, 1946.

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cific sense—while recognizing the duty of the commander and the violation of the law of war for failure to exercise that duty, the duty was all the more absolute in *Yamashita* because of General Yamashita's additional responsibilities as military governor of the Philippines. As military governor, all trust, care, and confidence of the population were reposed in him. This was in addition to his duties and responsibilities as a military commander, a point refined in the *High Command* and *Hostages* cases which follow.¹¹⁹

C. THE "HIGH COMMAND" CASE

Perhaps the most important of the war crimes trials involving the question of command responsibility was the Nuremberg trial of *United States v. Wilhelm von Leeb*,¹²⁰ also known as "The High Command Trial." The accused were thirteen of the higher ranking German officers in American custody;¹²¹ all held important staff and/or command positions in the German military. The Tribunal hearing the case was composed of Presiding Judge John C. Young, former Chief Justice of the Supreme Court of Colorado; Associate Judge Justin W. Harding, formerly U.S. District Judge, First Division, District of Alaska; and Associate Judge Winfield B. Hale, a Justice on the Tennessee Court of Appeals on leave of absence.¹²²

¹¹⁹ The other major objection to the trial of General Yamashita — lack of due process — has generally been mooted by the provisions of the Geneva Conventions of 1949 which provide fundamental legal protections for those charged with violation of the Conventions or other laws and subjected to trial by a state other than their own.

¹²⁰ Vols. X and XI TWC.

¹²¹ Generalfeldmarschall (General of the Army) Wilhelm von Leeb, Generalfeldmarschall (General of the Army) Hugo Sperrle, Generalfeldmarschall (General of the Army) Georg Karl Friedrich-Wilhelm von Kuechler, Generaloberst (General) Johannes Blaskowitz, Generaloberst (General) Hermann Hoth, Generaloberst (General) Hans Reinhardt, Generaloberst (General) Hans von Salmuth, Generaloberst (General) Karl Hollidt, Generaladmiral (Admiral) Otto Schniewind, General der Infanterie (Lieutenant General, Infantry) Karl von Roques, General der Infanterie (Lieutenant General, Infantry) Hermann Reinecke, General der Artillerie (Lieutenant General, Artillery) Walter Warlimont, General der Infanterie (Lieutenant General, Infantry) Otto Woehler, and Generaloberstabsrichter (Lieutenant General, Judge Advocate) Rudolf Lehmann.

General Johannes Blaskowitz committed suicide in prison on 5 February 1948, and thereby the case against him was terminated. XI TWC 462-463.

¹²² XI TWC 462.

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The indictment alleged four offenses: (1) Crimes Against Peace¹²³ (2) War Crimes¹²⁴ (3) Crimes Against Humanity¹²⁵ (4) Conspiracy to Commit the Crimes Charged in Counts

¹²³ None of the accused were found guilty of Count One, as none were considered to have been involved in the policy-making decisions alleged.

¹²⁴ Count Two — War Crimes — Count two of the indictment, paragraph 45, is as follows:

45. Between September 1939, and May 1945, all of the defendants herein . . . committed war crimes and crimes against humanity . . . in that they participated in the commission of atrocities and offenses against prisoners of war and members of armed forces of nations then at war with the Third Reich or under the belligerent control of or military occupation by Germany, including but not limited to murder, ill-treatment, denial of status and rights, refusal of quarter, employment under inhumane conditions and at prohibited labor of prisoners of war and members of military forces, and other inhumane acts and violations of the laws and customs of war. The defendants committed war crimes and crimes against humanity in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of war crimes and crimes against humanity.

Then follows paragraph 46, which in general terms sets out the unlawful acts.

Paragraph 47 alleged issuance and execution of the "Commissar" Order, which provided for summary execution of Soviet political commissars; Counts 48 and 49, the issuance and execution, respectively, of the "Commando" Order, which directed that all allied troops on commando missions, even if in uniform, whether armed or disarmed, offering resistance or not, were "to be slaughtered to the last man." Counts 50 through 53 dealt with alleged use of prisoners of war for prohibited labor; while Counts 54 through 58 alleged murder and ill-treatment of prisoners of war. As part of these charges the accused allegedly implemented a number of illegal orders. The Barbarossa Jurisdiction Order was intended for application on the eastern front and concerned the military jurisdiction of military commanders over enemy civilians or inhabitants of that area. The Night and Fog Decree directed that non-German civilians be taken to Germany for handling by the Ministry of Justice in Germany. Other orders provided for the taking of hostages and the execution of reprisals.

¹²⁵ Count Three — Paragraph 59 of the indictment, is as follows:

59. Between September 1939, and May 1945, all of the defendants herein . . . committed war crimes and crimes against humanity . . . in that they participated in atrocities and offenses, including murder, extermination, ill-treatment, torture, conscription to forced labor, deportation to slave labor or for other purposes, imprisonment without cause, killing of hostages, persecutions on political, racial and religious grounds, plunder of public and private property, wanton destruction of cities, towns and villages, devastation not justified by military necessity, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by Germany.

The following paragraphs 60 to 82 set forth generally and particularly the unlawful acts, such as enslavement of the population, plunder of public

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One, Two, and Three.¹²⁶ Before entering judgment as to the guilt or innocence of each of the accused, the Tribunal discussed the offenses at length. As in *Yamashita*, there was no question that the offenses occurred; the only questions to be resolved concerned the standard of responsibility and, based on that standard, the individual responsibility of each accused.

It was to the standard of responsibility that the Tribunal first addressed itself. Initially, the Tribunal stated:

For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.¹²⁷

From the outset the prosecution urged a theory of strict liability of the commander, even where orders were not obviously criminal or where an order is routinely passed without review by a commander from a superior headquarters to a subordinate. The Tribunal rejected these arguments, stating that

... to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.¹²⁸

and private property, murder, etc., and participation of the defendants in the formulation, distribution and execution of these unlawful plans.

¹²⁶ Count Four was subsequently struck by the Tribunal on the basis of duplicity, inasmuch as it tendered no issue not contained in the preceding counts (XI TWC 483).

¹²⁷ XI TWC 510. It is submitted that the use of the word "moral" was a poor choice, as any obligation if "fixed by international law" is legal rather than moral. While a moral obligation through custom may have become a legal obligation, one does not normally risk criminal liability for violation of a purely moral obligation.

¹²⁸ The Tribunal continued, careful to distinguish between implementation and transmittal:

Transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the command without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command.

Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are

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The Tribunal next addressed the problem of the commander's criminal responsibility for actions committed within his command pursuant to criminal orders passed down independent of his command.¹²⁹ The Tribunal stated the commander has four alternatives in such a situation: (1) he can issue an order countermanning the order; (2) he can resign his commission; (3) he can sabotage the enforcement of the order within a somewhat limited sphere; or (4) he can do nothing.

In discussing these alternatives under the pluralistic or dual command system which existed in Nazi Germany, the Tribunal found none of the alternatives viable, yet nevertheless concluded that the commanders concerned must be responsible.¹³⁰ Citing Control Council Law No. 10, Article II, paragraph 2,¹³¹ the Tribunal concluded that "[a]ny participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforce-

issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Without certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.

Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers—not lawyers. Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

XI TWC 510-11.

¹²⁹ This situation while more likely to occur under the pluralistic system of command could occur under our bureaucratic system of command. See discussion *infra* at text to ns. 270-277.

¹³⁰ XI TWC 511-512.

¹³¹ Control Council Law No. 10, Article II, paragraph 2, provides in pertinent part as follows:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he * * * (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission * * *. [Emphasis supplied by Tribunal] XI TWC 512.

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ment by his subordinates, constitutes a criminal act on his part."¹³²

The Tribunal found the situation analogous to any other plea of superior orders; while no defense, it was a mitigating circumstance.¹³³

In next considering the responsibility of commanders for orders issued by members of their staff, the Tribunal did not see fit, under ordinary circumstances, to vary the traditional military adage that while a commander may delegate authority, he may never delegate responsibility.¹³⁴

After considering the legality of the various orders which the accused allegedly issued, the Tribunal again addressed the collective question of command responsibility and again rejected any concept of strict liability:

¹³² *Supra* n. 130, at 512. It is submitted that the Tribunal found itself treading a very thin line in distinguishing implementation of orders, "tacit or otherwise," and "mere transmittal," discussed *supra* n. 114, the former requiring knowledge and intent, the latter being an uninformed ministerial act. The question of culpability would seem to turn on whether the command had a duty to know the contents of the order transmitted.

¹³³ *Id.* at 512. Both denial of the plea of superior orders as a defense and its consideration in mitigation were prescribed by Article II, § 4(b) of Control Council Law No. 10.

¹³⁴ *Id.* at 514. The accused found their positions in conflict, not only with each other but with themselves. Those on trial as commanders pointed out that there were certain functions which they of necessity left to their chiefs of staff and that at times they did not know of orders which might be issued under authority of their command. Staff officers on trial urged that a commander was solely responsible for what was done in his name. Several accused had served in both capacities, and hence were caught on the horns of the dilemma.

U.S. Army field manuals of that time and at present support the concept of the non-delegable responsibility of the commander. FM 100-5, OPERATIONS OF ARMY FORCES IN THE FIELD, provides at paragraph 3-1:

The authority vested in an individual to direct, coordinate, and control military forces is termed "command." This authority, which derives from law and regulation, is accompanied by commensurate responsibility that cannot be delegated. The commander alone is responsible for the success or failure of his command under all circumstances.

U.S. DEPT OF ARMY, FIELD MANUAL 101-5, STAFF OFFICERS FIELD MANUAL: STAFF ORGANIZATION AND PROCEDURE (1972), provides:

Paragraph 1-4

b. The commander alone is responsible for all that his unit does or fails to do. He cannot delegate this responsibility.

Paragraph 1-9 is applicable to the situation presently under consideration:

b. When the commander authorizes staff officers to issue orders in his name, the commander retains responsibility for these orders.

For discussion of staff responsibility see Douglass, *High Command Case: A Study in Staff and Command Responsibility*, 6 INT. LAWYER 686 (October 1972).

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Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.¹³⁵

The Tribunal next addressed the duties and responsibilities of a military commander of an occupied territory whose authority has been limited by his own government or is not otherwise absolute:

Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is *per se* responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate. In this respect, however, it must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the state itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will.

In this connection the *Yamashita* case has been cited. While not a decision binding upon this Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however, entirely applicable to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the state, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities.

¹³⁵ *Supra* note 130 at 543-544.

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It is the opinion of this Tribunal that a state can, as to certain matters, under international law limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area. He is the instrument by which the occupancy exists. It is his army which holds the area in subjection. It is his might which keeps an occupied territory from reoccupancy by the armies of the nation to which it inherently belongs. It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the state which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment. The situation is somewhat analogous to the accepted principle of international law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.

We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.¹³⁶

Where such authority has been allegedly removed from a commander, or where a commander has denied knowledge of illegal activities by other units, the Tribunal stated a court should examine both objective and subjective factors in considering the validity of any such defense.¹³⁷

The Tribunal, in concluding, turned to the individual accused and their responsibility for the acts alleged.¹³⁸

1. *Wilhelm von Leeb*: Von Leeb, a former General of the Army, was charged with offenses committed during the period in which he was commanding general of Army Group North.¹³⁹ These offenses dealt with: (a) The Commissar Order; (b) crimes against prisoners of war; (c) The Barbarossa Jurisdiction Order; (d)

¹³⁶ *Id.* at 544-545.

¹³⁷ *Id.* at 548-549. The accused were again confronted by the inconsistencies of their own arguments: they claimed they had been vested of executive authority for their territory by orders of the SD while denying knowledge of the duties and activities of the SD, which were established and defined by the same orders. For a discussion of the subjective criteria to be utilized in determining a commander's knowledge and responsibility, see *infra* text at notes 288-293.

¹³⁸ Only the charges of those accused as commanders are discussed. For a discussion of the question of responsibility of the staff officer, see Douglass note 134 *supra*.

¹³⁹ Von Leeb was Commander in Chief of Army Group North in the campaign against Russia until January 16, 1942, when he resigned primarily because of interference in technical matters by Hitler; he was then placed in reserve.

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crimes against civilians; (e) pillage of public and private property; and (f) criminal conduct pertaining to the siege of Lenin-grad. The Tribunal considered each *seriatim*; in preface the Tri-bunal stated:

The evidence establishes the criminal orders were executed by units subordinate to the defendant and criminal acts were carried out by agencies within his command. But it is not considered under the situation outlined that criminal responsibility attaches to him merely on the theory of subordination and over-all com-mand. He must be shown both to have had knowledge and to have been connected to such criminal acts, either by way of participation or criminal acquiescence.¹⁴⁰

a. *The Commissar Order.* The evidence showed that von Leeb recognized the Commissar Order to be in violation of international law from the outset, and voiced his opposition to those senior to him on a continuous basis. As a result of the resistance to the order by von Leeb and his fellow Russian front commanders, von Rundstedt and von Bock, the question of its application was resub-mitted to Hitler on September 23, 1941, who refused to change the decree. In putting the order into effect, von Leeb's headquarters had no implementing authority; merely the administrative func-tion of passing it to subordinate commanders. Yet the evidence showed that von Leeb not only advised his subordinate command-ers of his opposition to the order, but advised them that he would fully implement the German high command's "maintenance of dis-cipline" order, which provided for strict measures to be taken against any soldier committing war crimes. He continued to re-sist the order until his retirement in January, 1942. The Tribunal concluded:

... we cannot find von Leeb guilty in this particular. He did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If his sub-ordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his.¹⁴¹

b. *Crimes Against Prisoners of War.* The Tribunal entered a finding of not guilty to this charge as the evidence failed to show von Leeb possessed either knowledge or a duty to know of crimes committed against prisoners of war. All responsibility for pris-oners at that time was in the hands of the quartermaster general, who was responsible directly to the German High Command and Hitler rather than through the tactical chain of command. Sub-ordinate units within General von Leeb's command responsible

¹⁴⁰ *Supra* n. 130 at 555.

¹⁴¹ *Id.* at 557-558.

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for the handling of prisoners of war were similarly responsible directly to the German High Command.¹⁴² As General von Leeb was heavily engaged during this period with the initial phases of the siege of Leningrad, a matter he was desperately attempting to conclude before winter, he had neither the authority nor the means of ascertaining what treatment prisoners of war were receiving.¹⁴³ As the Tribunal stated:

... [H]e ... had the right to assume that the officers in command of those [subordinate] units [charged with responsibility] would properly perform the functions which had been entrusted to them by higher authorities, both as to the proper care of prisoners of war or the uses to which they might be put.¹⁴⁴

c. *The Barbarossa Jurisdiction Order.* The evidence established that von Leeb, while expressing personal disapproval, implemented this order by passing it into the chain of command. The order was illegal in part; and, as his implementing order made no effort to clarify its instructions or prevent its illegal application, "having set this instrument in motion, he must assume a measure of responsibility for its illegal application."¹⁴⁵

d. *Crimes Against Civilians.* This charge derived from the activities of a Nazi Security Police unit, which was assigned to and operated within General von Leeb's Army Group North area. While these activities included acts of mass murder—some by units subordinate to Army Group North but on order of the Security Police—and recruitment of slave labor, with one exception there was no evidence to establish that the orders for these illegal activities or reports thereof passed through or were received by Army Group North. In that one case, although reported to von Leeb as having been carried out by a local self-defense organization of Latvians, he immediately took action to prevent any recurrence. The Tribunal concluded that insufficient evidence existed to establish General von Leeb's knowledge of the acts alleged.¹⁴⁶

e. *Pillage of Public and Private Property.* The evidence presented failed to establish that the acts committed were illegal under

¹⁴² *Id.* at 558.

¹⁴³ See generally HART, HISTORY OF THE SECOND WORLD WAR (1971), p. 157 *et seq.* and SALISBURY, THE 900 DAYS (1969), p. 334 *et seq.*

¹⁴⁴ XI TWC 558. The author would qualify this statement with what may be the obvious, as follows: A commander has the right, *within reason*, to assume, etc. What is reasonable under the circumstances would depend on a number of criteria, all of which relate to putting a commander on notice. See discussion, *infra* text at fnnts. 288-293.

¹⁴⁵ *Id.* at 560-561.

¹⁴⁶ *Id.* at 561-562.

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the circumstances, based on questions of military necessity.¹⁴⁷ Similar findings were made to charges concerning conduct pertaining to the seige of Leningrad.¹⁴⁸

The Tribunal recognized several subjective matters in conclusion:

We believe that there is much to be said for the defendant von Leeb by way of mitigation He was a soldier and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.¹⁴⁹

2. *Hugo Sperrle*: Former commanding general of the "Condor Legion" during the Spanish Civil War and the representative of the Luftwaffe in the High Command trial, Sperrle was acquitted of all charges, the Tribunal finding that Sperrle, rather than implementing the one order which formed the basis of the charge against him, on principle opposed it and sought to make it ineffective.¹⁵⁰

3. *Georg Karl Friedrich-Wilhelm von Kuechler*: General von Kuechler served as a subordinate commander to General von Leeb, succeeding him as Commanding General of Army Group North in January 1942. He continued in this command until January 1944, when he was placed in the Reserves. The Tribunal addressed the list of charges in order.

a. *The Commissar Order*. Although von Kuechler testified concerning his opposition to the Commissar Order, the Tribunal found his testimony irreconcilable with an earlier affidavit in which he denied any knowledge of the order. There was no question that the order was transmitted to and through his headquarters, nor that it was enforced by subordinate units. Reports were made by these subordinate units to his headquarters that commissars were being executed by them. General von Kuechler denied knowledge of those reports, to which the Tribunal replied: "It was his business to know, and we cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the order."¹⁵¹

b. *Neglect of Prisoners of War and Their Use in Prohibited Labor*. Based on an order to subordinate units that General von

¹⁴⁷ *Id.* at 562-563.

¹⁴⁸ *Id.* at 563.

¹⁴⁹ *Id.* at 563.

¹⁵⁰ *Id.* at 565.

¹⁵¹ *Id.* at 567.

Kuechler admitted must have passed through his headquarters, both civilians and prisoners of war were utilized for improper and dangerous work. The Tribunal concluded that the evidence supported a finding that General von Kuechler had knowledge of and approved such practice.

c. Illegal Execution of Russian Soldiers and Murder and Ill-treatment of Prisoners of War. While the evidence was extensive that Russian prisoners of war had been illegally executed and that they were executed pursuant to orders of the German High Command, the Tribunal did not feel that the evidence adequately established General von Kuechler's transmittal of them. The Tribunal did find that subordinate units submitted reports to his headquarters over a wide period of time, and noted: "These reports must be presumed in substance to have been brought to his attention."¹⁵² His own testimony indicated he was aware of the reports, yet took no corrective action. The Tribunal concluded that he not only tolerated but approved the execution of these orders.¹⁵³ Nor was there any question, based on numerous reports received by his headquarters, the inordinately high death rate,¹⁵⁴ and by his own admission that he had personally visited every prisoner of war camp in his area, that he had knowledge of the extensive neglect and ill-treatment of prisoners of war in his area. The Tribunal held von Kuechler to be guilty of criminal neglect of prisoners of war within his jurisdiction.¹⁵⁵

d. Deportation and Enslavement of the Civilian Population. The massive deportation program was carried out pursuant to orders executed by General von Kuechler, which the Tribunal found "establish beyond question the ruthless manner in which he contributed to this program and also the ruthless manner in which he evacuated hundreds of thousands of helpless people, contrary to the dictates of humanity and the laws of war."¹⁵⁶

¹⁵² *Id.* at 568.

¹⁵³ *Id.* at 568.

¹⁵⁴ On November 9, 1941, General von Kuechler's Chief of Staff received a report that "at present 100 men are dying daily." At another conference held at his headquarters on November 28, 1941, it was disclosed that all of the inmates in one camp were expected to die within six months because of ill-treatment and lack of adequate rations. XI TWC 569.

¹⁵⁵ General von Kuechler was convicted of ill-treatment offenses occurring while he was commander of 18th Army; he was acquitted of charges of neglect occurring after he relieved General von Leeb. XI TWC 569.

¹⁵⁶ XI TWC 576-577. The tribunal also found von Kuechler guilty of the use of the civilian population for work directly connected with the waging of war contrary to the rules of international law without discussion of the evidence in support thereof. XI TWC 577.

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e. Murder, Ill-treatment, and Persecution of Civilian Population; and Enforcement of the Barbarossa Jurisdiction Order. Citing *Yamashita*, the prosecution again argued General von Kuechler's absolute liability as commanding general of the occupied territory for offenses committed by the Security Police.¹³⁷ While rejecting

¹³⁷ The Prosecution's theory as to the responsibility of a commanding general is revealed in the following paragraphs taken from the Memorandum on the responsibility of von Kuechler under Counts II and III:

The annex to the 4th Hague Convention lays down as the first condition which an armed force must fulfil in order to be accorded the right of a lawful belligerent that "it must be commanded by a person responsible for his subordinates" (Annex to the 4th Hague Convention, Article I). Implicit in this rule is the point that in a formally organized army, the commander is at all times required to control his troops. He is responsible for the criminal acts committed by his subordinates as a result of his own inaction. As the Supreme Court of the United States held in *In re Yamashita*:

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized and its breach penalized by our own military tribunals. . . .

Most extensive rights and corresponding responsibilities are conferred by positive provisions of international law upon the commanding general in occupied territory. The heading of Section III of the Hague Regulations mentions specifically the "military authority over the territory of the hostile State." Article 42 declares that "territory is considered occupied when it is actually placed under the authority of the hostile army." Article 43 imposes the duty on the occupant to restore and to ensure public order and safety and to respect the laws in force in the country, "the authority of the legitimate power having, in fact, passed into the hands of the occupant." In Article 57, it is expressly stated that no contribution shall be collected except under local order and on the responsibility of a C-in-C.

It follows that international law acknowledges no other bearer of executive power except the commander of the occupying army, and for this reason a unilateral delegation of this power to some agency other than the military commander is not recognized by international law, and is ineffective to relieve the military commander, *pro tanto*, of his duties and responsibilities.

Counsel for von Kuechler replied:

The Prosecution attempts to explain these Rules of Land Warfare in such a way that it would appear that Field-Marshal von Kuechler, in his capacity of Commander-in-Chief, was territorially responsible for everything that happened at any time in the occupied enemy area.

However, such a territorial responsibility exists neither in the practice nor in the theory of International Law. Even the Supreme Court in its judgment of *Yamashita* could not decide to recognize

this argument "for substantially the same reasons as given in the judgment concerning von Leeb,"¹⁵⁸ the Tribunal found that both acts alleged were carried out pursuant to orders promulgated or disseminated by General von Kuechler by units under his command.¹⁵⁹ Initially manifesting knowledge of the illegal activities of the Security Police through a directive to his troops to avoid contact or interference with any such units, he subsequently distributed the anti-Semitic Reichenau Order on October 10, 1941, which the Tribunal set out in full in its opinion "because of its inhumanity."¹⁶⁰ Conviction on these counts, then, was based on his knowledge of, acquiescence in and, in some cases, direct order of the offenses alleged.

4. *Hermann Hoth*: General Hoth was also charged with offenses relating to commands held on the Russian front.

a. *The Commissar Order*. General Hoth was found to have passed to subordinate units an order which the Tribunal found was

such a responsibility. Such a responsibility—to use the words of the judgment of the jurists—would lead to the result:

that the only thing for a Tribunal in a case would be to pronounce the declaration of guilty. . . .

The Yamashita Judgment, therefore, also takes the factual jurisdiction as a basis. Time and again it speaks of the armed forces under the orders of the Commander-in-Chief, of the soldiers who were bound to carry out his orders, of the units which he commanded.

The judgment against Field-Marshal List (Case 7, Military Tribunal V) cannot be interpreted in the meaning of territorial responsibility either, although there may be some items which point in this direction. The decisive factor is that the judgment always examines the factual jurisdiction. In this connection I want to refer to the expositions as on pages 10377 and 10419 of the German transcript. In the last-named case, the Tribunal investigated the relation of subordination of an SS Police leader and the Tribunal would have no need to undergo this work if it was to affirm unreservedly the maxim of territorial responsibility. It can be inferred herefrom that there will be a personal responsibility of a Commander-in-Chief only if:

(1) An action took place in the territory which he controlled, or

(2) If it was committed by somebody who was under his orders.

It is significant that the Hague Convention on Land Warfare only speaks of the "Occupying Power" and by this means the Occupying State. The counterpart of the indigenous civilian population, therefore, is not an individual person, but the occupying State. And that is only logical, because the war against the Soviet Union had been declared by the German Reich and not by some Commander-in-Chief, as, for instance, by Field-Marshal von Kuechler. As cited XII L.R.T.W.C. p. 108, n. 1.

¹⁵⁸ *Supra* n. 130 at 578.

¹⁵⁹ *Id.* at 577 (Barbarossa Jurisdiction Order); 578-583 (civilian population violations).

¹⁶⁰ *Id.* at 578-580.

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criminal on its face. The Tribunal concluded: "When those units committed the crimes enjoined by it, the superior commander must bear a criminal responsibility for such acts because he ordered their commission."¹⁶¹

After unsuccessfully pleading the defense of superior orders, Hoth offered the following in defense or mitigation (in the words of the Tribunal):

... he simply passed it down without emphasizing it or attempting to mitigate it ... he was certain that his subordinates were sufficiently radar-minded to pick up the rejection impulses that radiated from his well known high character and that he believed that they would have the courage he lacked to disobey the order.¹⁶²

The Tribunal in rejecting his argument stated:

... the mere unexpressed hope that a criminal order given to a subordinate will not be carried out is neither a defense nor a ground for the mitigation of punishment. That the character impulses were too weak or the minds of the subordinates were too insensitive to pick them up is shown by the documents.¹⁶³

b. Prisoner mistreatment. Hoth was also charged with ill-treatment and improper use of prisoners of war, war crimes and crimes against humanity consisting of crimes against civilians, and cooperation with the Security Police in execution of their illegal programs. He was found guilty on all counts on the basis of orders issued by him and carried out by units of his command.¹⁶⁴

5. Hans Reinhardt: General Reinhardt was charged with offenses that occurred while he was commander of Panzer Group 3, 3rd Panzer Army, and Commander in Chief of Army Group Center, all on the Russian Front.

a. The Commissar Order. General Reinhardt testified that in transmitting this order, he simultaneously issued verbal orders that it was not to be carried out. After an extensive listing of executions of Russian commissars by General Reinhardt's command, the Tribunal in rejecting this argument stated:

If international law is to have any effectiveness, high commanding officers, when they are directed to violate it by committing murder, must have the courage to act, in definite and unmistakable terms, so as to indicate their repudiation of such an order. The proper report to have been made ... when a request was made from the top level to report the number of commissars killed would have been that this unit does not murder enemy prisoners of war.¹⁶⁵

¹⁶¹ *Id.* at 581-582.

¹⁶² *Id.* at 582.

¹⁶³ *Id.* at 582.

¹⁶⁴ *Id.* at 584-596.

¹⁶⁵ *Id.* at 598.

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In passing on this criminal order, the Tribunal found General Reinhardt bore the responsibility for its execution in his area.

b. The Commando Order: General Reinhardt was found guilty of passing this order, although the Tribunal noted:

It may be stated as a matter somewhat in mitigation and as showing the personal attitude of . . . Reinhardt, that in November 1943, he issued an order that parachutists are lawful combatants and are to be treated as prisoners of war. That was at a time when the German Army was not so flushed with success and when it was a little more inclined to soften the treatment meted out to the Russians. The Tribunal has noted it as being a matter proper, at least for consideration, on the matter of mitigation. It should further be noted in this connection that it does not appear that Reinhardt, thought he received it, ever passed on literally or in substance the notorious Reichenau Order.¹⁶⁶

c. Prohibited Labor of Prisoners of War, Murder, and Ill-Treatment of Prisoners of War, and Turning Over of Prisoners to the Security Police. The Tribunal found that Reinhardt had issued orders concerning the use of prisoners of war in prohibited labor and had received reports at his headquarters concerning all three illegal activities, in one instance manifesting his knowledge of these activities by opposing authorizing the Red Cross to make any search for prisoners missing in action for the following reason: "Overwhelmingly large number of POW's deceased without documentary deposition, and of civilians who disappeared due to brutal actions."¹⁶⁷

Citing the opinion in *United States v. List*,¹⁶⁸ the Tribunal concluded that any reports made to General Reinhardt's headquarters were made for his benefit; therefore he was responsible for knowledge of their contents.¹⁶⁹

d. Deportation and Enslavement of Civilians. The Tribunal found the evidence established that in the area of General Reinhardt's army, enforced labor by civilians was carried out as a policy and that it was implemented ruthlessly with General Reinhardt's knowledge and consent, and even pursuant to his orders;¹⁷⁰ forcible conscription for deportation was a fixed policy. In reply to Reinhardt's denial of such a policy, the Tribunal stated:

. . . the orders and reports cited, and others to which we have not referred, show clearly that the deportation of civilian workers to the Reich was of such long continued and general practice, that

¹⁶⁶ *Id.* at 600.

¹⁶⁷ *Id.* at 602.

¹⁶⁸ XI TWC 759, discussed *infra* n. 195.

¹⁶⁹ *Supra* n. 130 at 603.

¹⁷⁰ *Id.* at 603-607.

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even were there no orders signed by the defendant authorizing it, he must be held to have had knowledge of the practice and of its extent.¹⁷¹

e. Murder, Ill-Treatment, and Persecution of Civilian Populations; the Barbarossa Jurisdiction Order. Not only was it established that General Reinhardt passed on the Barbarossa Jurisdiction Order, but that he issued implementing instructions and received extensive reports concerning its execution. Addressing only the point of slave labor, the Tribunal stated "Slave hunting in his area was so general and long continued that without the direct evidence pointed out, knowledge would be imputed to him."¹⁷²

6. Hans von Salmuth: General von Salmuth was charged with offenses which occurred while in command at the Corps and Army level on the Russian front.

a. The Commissar Order. Upon its receipt, General von Salmuth distributed the Order to his subordinate units, advising them that he rejected it and acquainting his division commanders with his objections. The Tribunal felt that the evidence tended to bear this out as the order was never carried out while General von Salmuth was in command, and acquitted him of this charge.¹⁷³

b. The Commando Order. The Order was transmitted to subordinate units by General von Salmuth's Chief of Staff with directions that all copies be returned within twelve days. The Tribunal found General von Salmuth guilty of issuance of the Order despite his protestations that the chief of staff should not have signed the letter and was not authorized to do so, as he had done nothing to repudiate his subordinate's action nor did he reprimand him in any way. He subsequently requested clarifying instructions concerning the Order's application from higher headquarters, and through his Quartermaster issued further instructions to a subordinate command, both acts manifesting his knowledge of the order and its implementation within his command.¹⁷⁴

c. Prohibited Labor of Prisoners of War; Murder and Ill-treatment of Prisoners of War; Deportation and Enslavement and Enslavement of Civilians; Illegal Reprisals. While the Tribunal could not conclude that General von Salmuth transmitted the Barbarossa Jurisdiction Order, he did issue orders implementing the execution of the provisions of the order and remained actively in-

¹⁷¹ *Id.* at 614.

¹⁷² *Id.* at 616.

¹⁷³ *Id.* at 616.

¹⁷⁴ *Id.* at 616-625.

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terested in their implementation.¹⁷⁵ In yet another basis for holding General von Salmuth criminally responsible, the Tribunal stated:

Concerning the treatment of prisoners of war in the areas under the defendant, numerous reports from these areas show what must be considered an excessive number of deaths by shooting and otherwise among the prisoners of war. They imply a degree of negligence on the part of the defendant These reports show that prisoners of war were handed over to the SD, a police organization, and that thereafter the army exercised no supervision over them and apparently had no control or record as to what became of them.

Whether or not they were liquidated, as many of them undoubtedly were, is not the question. The illegality consists in handing them over to an organization which certainly by this time [1941] the defendant knew was criminal in nature.

. . . he must accept criminal responsibility for the illegal transfer of these prisoners to the SD.¹⁷⁶

7. *Karl Hollidt*: General Hollidt was charged with offenses that occurred while he served as a division, corps, and army commander.

a. *The Commissar Order*. General Hollidt testified that on receipt of the Order he instructed his regimental commanders not to comply with it. The one isolated incident reported was described by the Tribunal as ambiguous. Furthermore, there was some question as to whether General Hollidt had actually assumed command of the unit at the time of the incident. Hence he was found not guilty of the offense.¹⁷⁷

b. *The Commando Order*. General Hollidt acknowledged receipt of the Order but denied its transmittal. As there was no evidence that it was ever carried out by units under General Hollidt's command, the Tribunal found General Hollidt not guilty of this charge.¹⁷⁸

c. *Prohibited Labor of Prisoners of War*. The evidence indicated that over a wide period of time prisoners of war were used by his subordinate units in the combat zone for construction of field fortifications. The Tribunal concluded this could only have been done with his knowledge and approval; thus, criminal responsibility attached.¹⁷⁹

d. *Murder and Ill-treatment of Prisoners of War*. This charge constituted yet another refusal by the Tribunal to apply the strict

¹⁷⁵ *Id.* at 617.

¹⁷⁶ *Id.* at 617.

¹⁷⁷ *Id.* at 626.

¹⁷⁸ *Id.* at 627.

¹⁷⁹ *Id.* at 627.

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liability theory urged by the prosecution. Concluding even if an assumption were made that certain executions were unjustified, the Tribunal concluded no criminal connection to General Hollidt was established.¹⁸⁰

e. Deportation and Enslavement of Civilians. General Hollidt was found criminally responsible for the deportation and enslavement of civilians as orders were issued in the former case which also tended to show his knowledge and consent, if not preference, for use of labor forces locally for construction of field fortifications.¹⁸¹

8. *Otto Schniewind:* Admiral Schniewind was acquitted of those charges under Counts Two and Three inasmuch as there was no evidence showing implementation or enforcement by any of the units subordinate to him of the orders alleged, the Barbarossa Jurisdiction Order and the Commando Order. In discussing the Barbarossa Jurisdiction Order, the Tribunal refused to adopt the prosecution's argument that would have shifted the burden of proof to the defendant to show what he did to discourage or stop implementation of the order (which did not occur until after Admiral Schniewind's departure from the command), finding such argument "rather naive."¹⁸²

9. *Karl von Roques:* Lieutenant General von Roques was charged with offenses committed while Commanding General of Rear Area of Army Group South (March 1941 to 15 June 1942) and Rear Area of Army Group A (July 1942 to December 1942). By his own testimony, General von Roques had executive power as the representative of the occupying power in his area. As such, he owed a duty to the civilians, he felt, because he needed their cooperation. The Tribunal noted despite this representation "neither his testimony nor his actions show that he appreciated the fact that he owed a duty as an occupying commander to protect the population and maintain order."¹⁸³ The Tribunal deemed it appropriate at this point to define executive power and the responsibility of a commander holding that power:

General Halder in his testimony succinctly defines executive power as follows:

"The bearer of executive power of a certain area unites all the legal authorities of a territorial nature and legislative nature in his own person."

¹⁸⁰ *Id.* at 628.

¹⁸¹ *Id.*

¹⁸² *Id.* at 629-630.

¹⁸³ *Id.* at 631.

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The responsibility incident to the possession of executive power is well stated in the judgment [in the *List* case] as follows:

"... This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense."¹⁸⁴

After citing the duties of a commander of occupied territory as recited by the Supreme Court in *Yamashita*, the Tribunal concluded:

We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area violating this duty which he owes, constitute criminality.¹⁸⁵

a. *The Commissar Order.* General von Roques denied issuing this order, a denial which the Tribunal found contrary to the facts but a factual differentiation unnecessary to resolve. The Tribunal found that whether or not the order was or was not passed on by him was immaterial; its implementation was so extensive in his territory as to require some action on his part to prevent the criminal action that was carried on by the units subordinate to his command and by agencies in his area. Commissars were regularly shot with his knowledge, and he did nothing about it. Furthermore, the Commissar Order which he received provided:

II. *In the rear areas* — Commissars arrested in the rear area ... are to be handed over to the 'Einsatzgruppe' or the 'Einsatzkommandos' of the SS Security Service (SD), respectively.¹⁸⁶

During the periods in question, these security service units were subordinate to Lieutenant General von Roques. The evidence showed that in one instance he received a direct written report of 1,896 executions by an SS Brigade during one two-week operation; and that he continued to receive similar reports as well as

¹⁸⁴ *Id.* at 631-632.

¹⁸⁵ *Id.* at 632.

¹⁸⁶ *Id.* at 632.

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issue orders directing the security police to participate in other operations. He also received and implemented an order which the Tribunal described as "so bestial as to be fit to be seen only by those to whom it was addressed" providing for extermination by security police elements of "unbearable elements."¹⁸⁷ The Tribunal concluded that General von Roques knew of the carrying out of the Commissar Order and therefore bore criminal responsibility for its implementation in his area.

b. Murder and Ill-treatment of Prisoners of War. The evidence was conclusive that General von Roques ordered the execution of paratroopers as guerrillas; that he had knowledge of and acquiesced in the execution of others; and through gross neglect of the sanitary conditions and lack of food in four prisoner of war camps permitted others to die at the rate of 100 per day, in three of those camps at rates in excess of 80 percent per year. The Tribunal concluded responsibility lay in General von Roques.¹⁸⁸

c. The Barbarossa Jurisdiction Order. General von Roques was found criminally responsible for implementation of this order as he passed it down to his subordinates; personally issued other orders in the implementation of it or pursuant to it which the Tribunal found criminal; and that these subordinate units thereafter carried out these orders with his full knowledge, acquiescence and approval.¹⁸⁹

d. Hostages and Reprisals. While General von Roques passed on an order directing that reprisals be taken against saboteurs, the Tribunal found themselves believing General von Roques' testimony that no such acts were actually carried out.¹⁹⁰

e. Ill-treatment and Persecution of the Civilian Population. The evidence reflected the complete subservience of army units in General von Roques' area to the security police and their full cooperation with the security police program with "knowledge of its debased and criminal character."¹⁹¹ While General von Roques issued orders directing his troops not to participate in the "arbitrary shooting" of Jews, he directed them to otherwise assist the security police in carrying out their orders.¹⁹²

10. Otto Woehler: General Woehler was charged with offenses committed both as a commander and as a staff officer; concern here is only with the former.

¹⁸⁷ *Id.* at 636-637.

¹⁸⁸ *Id.* at 639-644.

¹⁸⁹ *Id.* at 645-647.

¹⁹⁰ *Id.* at 647.

¹⁹¹ *Id.* at 648.

¹⁹² *Id.* at 648.

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a. *Murder and Ill-treatment of Prisoners of War.* One isolated incident involving the illegal execution of two Russian soldiers was reported by General Woehler to his next higher headquarters. While the evidence tended to show that he did nothing about this incident, the Tribunal refused to conclude that this established acquiescence and approval.¹⁹³

b. *Prohibited Labor of Prisoners of War.* The Tribunal found that General Woehler had knowledge of and acquiesced in the use of prisoners of war by regiments of his command as illegal labor in forward combat areas. They rejected the *tu quoque* argument, stating "The fact that similar use was made of German prisoners by the enemy is only a factor in mitigation and not a defense."¹⁹⁴

D. THE HOSTAGE CASE

The second significant joint trial at Nuremberg involving the question of command responsibility was the trial of *United States v. Wilhelm List*, also known as "The Hostage Case," tried between July 8, 1947 and February 19, 1948.¹⁹⁵ The accused, all high-ranking officers of the military,¹⁹⁶ were charged with being principals and accessories to the murder and deportation of thousands of persons from the civilian populations of Greece, Yugoslavia, Norway and Albania between September 1939 and May 1945 by troops under their command who were acting pursuant to orders issued, distributed and executed by the defendants.¹⁹⁷ Members of the

¹⁹³ *Id.* at 684-685.

¹⁹⁴ *Id.* at 685.

¹⁹⁵ Reported at XI TWC 759 to 1332.

¹⁹⁶ The accused were Generalfeldmarschall (General of the Army) Wilhelm List; Generalfeldmarschall Maximilian von Weichs; Generaloberst (General) Lothar Rendulic; General der Pioniere (Lieutenant General, Engineers) Walter Kuntze; General der Infanterie (Lieutenant General, Infantry) Hermann Foertsch; General der Gebirgstruppen (Lieutenant General, Mountain Troops) Franz Boehme; General der Flieger (Lieutenant General, Air Force) Helmuth Felmy; General der Gebirgstruppen Hubert Lanz; General der Infanterie Ernst Dehner; General der Infanterie Ernst von Leyser; General der Flieger Wilhelm Speidel; and Generalmajor (Brigadier General) Kurt von Geitner. Lieutenant General von Boehme committed suicide after indictment and prior to arraignment; General von Weichs became ill on October 6, 1947, and for medical reasons his case was subsequently severed from that of the remaining defendants.

¹⁹⁷ The charges against the defendants were:

COUNT ONE: Alleged the murder of "hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania. . ."

COUNT TWO: Alleged the "wanton destruction . . . and other acts of devastation not justified by military necessity, in the occupied territories of Norway, Greece, Yugoslavia, and Albania. . ."

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Tribunal were two civilian jurists and an equally-distinguished civilian practitioner.¹⁹⁸

The main precedential value of the *Hostage Case* is its examination of the law of reprisal; this concept will not be examined. Additionally, this review will concern itself only with those defendants charged with offenses allegedly committed while the defendants were holding positions of command.

In initially dealing with the question of command responsibility, the Tribunal found it necessary to address a factual dispute and its legal implications:

We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for acts charged as crimes have been denied because of absence from headquarters at the time of their commission. These absences generally consisted of visitations to points within the command area, vacation leaves and leaves induced by illness . . .

We desire to point out that the German *Wermacht* was a well equipped, well trained, and well disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war.

The evidence shows . . . that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening. Ten-day and monthly reports recapitulating past operations and stating future intentions were regularly made. They not only received their own information promptly but they appear to have secured that of the enemy as well. We are convinced that military information was received by these high ranking officers promptly, a conclusion prompted by the efficiency of the German armed forces.

An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity

COUNT THREE: Alleged offenses committed against enemy troops and prisoners of war in Greece, Yugoslavia, and Italy, including refusal of quarter, denial of status as prisoners of war, and murder and ill-treatment of prisoners of war.

COUNT FOUR: Alleged the "murder, torture, and systematic terrorization, imprisonment in concentration camps, arbitrary forced labor on fortifications and entrenchments to be used by the enemy, and deportation to slave labor, of the civilian populations of Greece, Yugoslavia, and Albania . . ." All offenses were alleged as "war crimes and crimes against humanity" committed "by troops of the German armed forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed, and distributed by (the defendants)," listing specific acts.

¹⁹⁸ The presiding judge was Charles F. Wennerstrum of the Supreme Court of Iowa; the members were Edward F. Carter of the Supreme Court of the State of Nebraska and George J. Burke, a member of the State Bar of Michigan.

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of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions, or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.¹⁹⁹

Turning to acts committed by units not subordinated to a commander or by independent units subordinated to agencies other than the German Wermacht, the Tribunal stated:

The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.²⁰⁰

As in the *High Command* case, the Tribunal began its findings by rejecting the contentions that the accused were party to any overall conspiracy to decimate and exterminate the population. In determining questions of guilt or innocence, the Tribunal declared it would require proof

. . . of a causative, overt act or omission from which a guilty intent can be inferred . . . Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment.²⁰¹

The Tribunal, after brief historical review, turned itself to the individual defendants.

1. *Wilhelm List*: General List, fifth ranking field marshal in the German Army, was charged with offenses committed by units of his command while serving as Armed Forces Commander Southeast and as commander in chief of Army Group A on the Russian front. In the former position he was the supreme repre-

¹⁹⁹ XI TWC 1259-1260.

²⁰⁰ *Id.* at 1260.

²⁰¹ *Id.* at 1261.

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sentative of the armed forces in the Balkans, exercising executive authority in the territories occupied by German troops.

The evidence showed that General List both passed to subordinates illegal orders from the high command as well as issuing orders demanding "ruthless . . . measures" against the local population.²⁰² Of other orders, General List denied knowledge as he was away from his headquarters at the time the reports came in. The Tribunal reiterated its previous position regarding a commander's responsibility in such a case:

A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area in his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made to their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

The reports made to . . . List . . . charge him with notice of the unlawful killing of thousands of innocent people. . . . Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.²⁰³

The Tribunal found General List guilty of counts one and three of the indictment.²⁰⁴

2. *Walter Kuntze*: General Kuntze was charged with offenses committed during his service as Armed Forces Commander Southwest. The Tribunal noted that General "Kuntze assumed command

²⁰² *Id.* at 1263-64.

²⁰³ *Id.* at 1271-1272.

²⁰⁴ *Id.* at 1274.

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on October 27, 1941, a month which exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons."²⁰⁵ The Tribunal found it highly improbable that General Kuntz could assume command in the midst of the carrying out and reporting of these reprisal actions without gaining knowledge thereof and acquiescing in their execution. Other evidence indicated Kuntze personally ordered other reprisals and received confirming reports on their completion. The Tribunal found that he was advised of all such killings, and that he not only failed to take measures to prevent their recurrence but on several occasions urged more severe action to be taken by his subordinate commanders. The Tribunal ruled that his ordering of and acquiescence in these and other offenses made him criminally responsible for charges alleged under counts one, three, and four.²⁰⁶

3. *Lothar Rendulic*: General Rendulic was charged with offenses committed while he was serving as commander of 2nd Panzer Army, 20th Mountain Army, and Army Group North. All the charges related to offenses resulting from his orders or orders he passed on to subordinate units. He was found not guilty of issuing the Commando Order and was found justified by military necessity in his utilization of scorched earth tactics in a retreat under severe conditions and against overwhelming odds in Norway.²⁰⁷

4. *Ernst Dehner*: As commander of the LXIX Reserve Corps, Lieutenant General Dehner was charged with unlawful killing of hostages and reprisals taken against prisoners, and with wanton destruction of towns and villages, both in an effort to suppress guerrilla activities operating in his area of responsibility. Specifically, General Dehner was charged as one of the subordinate commanders of General Rendulic. The Tribunal noted:

It appears to us from an examination of the evidence that the practice of killing hostages and reprisal [against] prisoners got completely out of hand, legality was ignored, and arbitrary action became the accepted policy. The defendant is criminally responsible for permitting or tolerating such conduct on the part of his subordinate commanders.²⁰⁸

5. *The Remaining Commanders*: The remaining commanders were found guilty of similar action or inaction. Lieutenant General von Leyser was found guilty of illegally conscripting indigen-

²⁰⁵ *Id.* at 1276.

²⁰⁶ *Id.* at 1281.

²⁰⁷ *Id.* at 1295-1297.

²⁰⁸ *Id.* at 1299.

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ous persons for military service and compulsory labor service, as well as issuing the Commissar Order.²⁰⁹ Lieutenant General Helmut Felmy was found guilty of passing on illegal reprisal orders resulting in extensive unwarranted, excessive and illegal reprisals; in one instance, on receipt of reports concerning reprisals conducted well in excess of existing orders, General Felmy recommended the most lenient punishment of the regimental commander responsible without follow-up to determine what punishment, if any, was assessed.²¹⁰ Lieutenant General Hubert Lanz was convicted of failing to prevent illegal reprisals of which he had knowledge, and with ordering the unlawful execution of Italian officers and soldiers of the surrendered Italian army.²¹¹ Finally, Lieutenant General Wilhelm Speidel was convicted of permitting illegal acts to occur of which he had knowledge.²¹²

E. THE HIGH COMMAND AND HOSTAGE CASES—IN SUMMARY

In the *High Command* and *Hostage* cases, commanders at division, corps, and army level—men prominent in their profession—were tried by three-judge tribunals, also men of professional prominence. Each tribunal was presented a variety of situations involving the intricacies and complexities of command and control of a military force in combat; the considered responses of the tribunals offer some of the more definitive reasoning and logic in arriving at standards of responsibility for commanders.

As in *Yamashita*, there was seldom any question that the offenses occurred; the question left for resolution concerned the standard of responsibility and, given the determination of that standard, the individual responsibility of each accused. *Yamashita* had confirmed the existence of *duty* and *responsibility*; the *High Command* and *Hostage* tribunals sought to achieve some definitional value for each. *Yamashita* addressed the duty and responsibility of the commander with a broad brush; the *High Command* and *Hostage* cases provided much of the detail necessary to complete the picture. Significantly, both minimum and maximum lines were drawn, the latter in express rejection of any purported *Yamashita*-strict liability theory. That rejection was not merely

²⁰⁹ *Id.* at 1300-1305.

²¹⁰ *Id.* at 1305-1309.

²¹¹ *Id.* at 1309-1313.

²¹² *Id.* at 1313-1317.

of the strict liability theory per se but of the proposition that *Yamashita* represents such a theory.

The *High Command* and *Hostage* cases are of greater value than *Yamashita* in that the respective opinions rendered therein are the product of judicial minds rather than of lay jurors, and prepared under less emotive circumstances; the blaze of war had died sufficiently to permit juristic scholarship providing necessary light for future interpretation rather than mere heat. The results of this careful examination have previously been analyzed.

F. THE TOKYO TRIALS

Of the war crimes trials conducted after World War II, the "International Japanese War Crimes Trial in the International-Military Tribunal for the Far East," otherwise known as and hereinafter called "The Tokyo Trial" was the longest, most complex, and perhaps least known.

Heard by distinguished jurists from eleven countries,²¹³ the Tokyo Trial brought before an international tribunal twenty-eight of the former leaders of Japan,²¹⁴ charged with crimes

²¹³ The Tribunal was composed of the following judges:

- Australia: Sir William Flood Webb, Chief Justice Supreme Court of Queensland; later Justice High Court of the Australian Commonwealth
- Canada: Stuart F. McDougall, Puisne Judge Quebec Court of King's Bench (Appeal Side)
- China: Mei, Juo-Ao, Acting Chairman, Foreign Affairs Committee, Legislative Yuan
- France: Judge Henri Bernard
- Great Britain: Lord Patrick, Senator, His Majesty's College of Justice in Scotland
- India: R. M. Pal, Judge, High Court of Calcutta
- Netherlands: Bernard V. A. Roling, Judge, Court of Utrecht
- New Zealand: Erima H. Northcraft, Justice, Supreme Court of New Zealand
- Philippines: Delfin Jaranilla, Justice, Supreme Court of the Philippines
- Soviet Union: J. M. Zaryanov, Major General of Justice, Military Collegium, Supreme Court of the Soviet Union
- United States: Myron H. Cramer, Major General, former Judge Advocate General of the United States Army.

²¹⁴ Those selected for indictment were former prime ministers Kaki Hirota, Kiichiro Hiranuma, Hideki Tojo and Kuniaki Koiso; foreign ministers Yosuke Matsuoka, Shigenori Togo, and Manoru Shigemitsu (a position which Hirota also held); war ministers Jiro Minami, Sadao Araki, Seishiro Itagaki, Shunroku Hata, and Tojo; navy ministers Osami Nagano and Shigetaro Shimada; finance minister Okinori Kaya; education ministers Koichi Kido and Araki; home ministers Hiranuma, Kido, and Tojo; overseas ministers Koiso and Togo; Presidents, Planning Board Naoki Hoshino and Teiichi Suzuki; Chiefs of Army General Staff Tojo and Yoshijiro Umezu; Ambassadors Hiroshi Oshima, Tashio Shiratori, Mamoru Shigemi-

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against peace, murder and conspiracy to commit murder, and war crimes and crimes against humanity. Counts 54 and 55, part of the latter group of charges, accused certain of the defendants with having ordered, authorized and permitted conduct in violation of the Laws and Customs of War; and with violating the laws of war by deliberately and recklessly disregarding their legal duty to take adequate steps to secure observance of the Laws and Customs of War and to prevent their breach, respectively.²¹⁵ It is with these latter counts, 54 and 55, that this article is concerned.²¹⁶

As in the *High Command* and *Hostage* cases, the Tribunal attempted to define the appropriate rules of law before examining the individual responsibility of each accused. In discussing the question of duties, responsibilities and responsibility under Counts 54 and 55, the Tribunal stated:

(b) RESPONSIBILITY FOR WAR CRIMES AGAINST PRISONERS

Prisoners taken in war and civilian internees are in the power of the Government which captures them. For the last two centuries, this position has been recognized and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as "prisoners") rest therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners, governments must have resort to persons. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties.

In general the responsibility for prisoners held by Japan may be stated to have rested upon:

- (1) Members of the government;
- (2) Military or naval officers in command of formations having prisoners in their possession;

tou, and Togo; and military leaders Heitaro Kimura, Koiso, Itagaki, Kuriaki Koiso, Iwane Matsui, Minami, Akira Muto, and Takasmui Oka. Also indicted were Kingoro Hashimoto and Shume Okawa. Matsuoka and Nagano died during the course of the trial and the case against Okawa was not considered because of his mental condition.

²¹⁵ Annex A-6, Volume 2, TOKYO JUDGMENT; also Annex A-6, Volume 204, Official Transcript of the International Japanese War Crimes Trials in the International-Military Tribunal for the Far East.

²¹⁶ For an excellent analysis of the Tokyo Trials, see Horwitz, *The Tokyo Trial*, INTERNATIONAL CONCILIATION, No. 465, November 1950; Cf. MINEAR, VICTOR'S JUSTICE (1971).

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(3) Officials in those departments which were concerned with the well-being of prisoner;

(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill treatment of prisoners if:

(1) They fail to establish such a system.

(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill treatment of prisoners. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.²¹⁷

Two points previously raised in the *Yamashita* trial were again raised by the military leaders in the Tokyo trial. The first was an objection to the theory of vicarious responsibility for acts committed by subordinates; this matter was dealt with in the Tribunal's general judgment previously discussed. Where a commander had the responsibility to act, while he could delegate the

²¹⁷ Volume 200, OFFICIAL TRANSCRIPT, pages 48,442 to 48,447.

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authority, he could not delegate the responsibility; in the words of the Tribunal, "He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application."²¹⁸

The second defense went to the subjective standards in individual cases. Like General Yamashita, the defendants argued that their failure of compliance was based upon impossibility of performance; that the allied offensive had forced conditions to deteriorate not only in prisoner of war camps but overall, and that it was impossible for military commanders in the field to maintain communication and control of their troops because of the deteriorating conditions.²¹⁹ The Tribunal chose to consider this argument on an individual basis, although noting (1) that once Japanese forces had occupied territory and fighting had ceased, massacres were freely committed in subjecting the local population to the domination of the Japanese;²²⁰ (2) that massacres of prisoners of war and civilian internees or conscripted laborers during the occupation were committed because they were no longer of any use or for other reasons had become a burden to the Japanese occupation force;²²¹ and (3) that other massacres were perpetrated in anticipation of a Japanese withdrawal or of an Allied attack.²²² The fact that these massacres occurred throughout the war tended to militate against this argument; rather, the Tribunal's detailed analysis of acts of murder, torture, mistreatment, vivisection, cannibalism, and neglect, often occurring as a result of direct orders from the Imperial Headquarters, often on a systematic basis throughout an occupied territory, led the Tribunal to conclude that such actions were carried out as a matter of policy by the Japanese Government or individual members thereof and by the leaders of the armed forces.²²³

In submitting specific findings as to each accused, the Tribunal first considered the case of General Konji Dohiharu. As commander of the 7th Area Army—an area which encompassed Malaya, Sumatra, Java, and for a time Borneo—from April 1944 until April 1945, he was responsible for the care of prisoners of war within his command. The evidence established prisoner

²¹⁸ Volume 200, OFFICIAL TRANSCRIPT, pages 48,444. *Also see*, I TOKYO JUDGMENT 30.

²¹⁹ Horwitz, *supra* n. 216 at 532.

²²⁰ 202 OFFICIAL TRANSCRIPT, 49,634.

²²¹ *Id.* at 49,635.

²²² *Id.* at 49,636.

²²³ *Id.* at 49,592.

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deaths at an "appalling rate" due to starvation, malnutrition, and food deficiency diseases. General Dohiharu submitted such instances occurred due to the deterioration of Japan's war position and the severance of communications. The Tribunal, in noting that these conditions applied only to prisoners and not among their captors, concluded that food and medical supplies were available but withheld upon a policy for which Dohiharu bore responsibility.²²⁴

General Shunroko Hata was commander of forces in China which committed atrocities on a large scale over an extended period of time. In finding him guilty of a breach of duty under Count 55, the Tribunal concluded:

Either Hata knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war and civilians were obeyed.²²⁵

Defense counsel for General Heitaro Kimura argued his innocence on the basis that he had issued orders to his troops to conduct themselves in a proper soldierly manner and to refrain from ill-treating prisoners. While doubting that such orders were even issued because of the extent of ill-treatment, the Tribunal found him at a minimum negligent in his duty to enforce the rules of war, stating:

The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders . . . His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.²²⁶

General Iwane Matsui was held criminally responsible for the infamous "Rape of Nanking." The Tribunal stated:

. . . from his own observations and the reports of his staff he must have been aware of what was happening. . . The Tribunal is satisfied that Matsui knew what was happening. He did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the city enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known and as he must have known . . . He had the power as he had the duty to control his

²²⁴ *Id.* at 49,779 to 49,780. The defense of "impossibility due to deteriorating war conditions" was also rejected in the case of General Seishiro Itagaki, at pages 49,789 to 49,800.

²²⁵ *Id.* at 49,784.

²²⁶ *Id.* at 49,809.

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troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty.²²⁷

After finding that General Akira Muto shared criminal responsibility for the starvation, neglect, torture and murder of prisoners of war and civilian internees and the massacre of civilians by virtue of orders which he promulgated as Japanese military commander in Northern Sumatra, the Tribunal turned to a review of his activities as Chief-of-Staff to General Yamashita:

Muto further demonstrated his disregard for the laws of war upon his transfer to become Chief-of-Staff under General Yamashita. . . . During his tenure . . . a campaign (of) massacre, torture, and other atrocities were waged by the troops under Yamashita and Muto on the civilian population of the Philippines, including the massacres in Batangau and massacres and other atrocities at Manila. These bore the same features and followed the pattern set eight years earlier at Nanking when Muto was a member of Matsui's staff. During this period prisoners of war and civilian internees were starved, tortured and murdered.²²⁸

Concluding, the Tribunal stated ". . . Muto shares responsibility for these gross breaches of the Laws of War. We reject his defense that he knew nothing of these occurrences. It is wholly incredible." ²²⁹

G. THE TRIAL OF ADMIRAL TOYODA

Admiral Soemu Toyoda, former Commander-in-Chief of the Japanese Combined Fleet, the Combined Naval Forces, and the Naval Escort Command, occupying all three positions concurrently from May 3, 1944, to May 29, 1945, and Chief of the Naval General Staff from May 30, 1945 to September 2, 1945, was tried by military tribunal in Tokyo in a trial which commenced on October 29, 1948 and concluded in Admiral Toyoda's acquittal on September 6, 1949—one of the last, if not the last, of the major war crimes trials concluded. It is a case of some significance to the subject of this article.

Admiral Toyoda was charged with violating "the laws and customs of war," the Charge setting out five specifications:

(Specification 1) willfully and unlawfully disregarding and failing to discharge his duties by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval

²²⁷ *Id.* at 49,815-816.

²²⁸ *Id.* at 49,737.

²²⁹ *Id.* at 49,821.

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personnel of units and organizations under his command, control and supervision to abuse, mistreat, torture, rape, kill and commit other atrocities; (*Specification 2*) willfully permitting, etc. unlawful pillage, plunder and destruction; (*Specification 3*) unlawful use of non-military objects and places such as churches and hospitals as fortifications; (*Specification 4*) willful and unlawful disregard and failure to discharge his duties by ordering and permitting the unlawful interment, mistreatment, abuse, starvation, torture and killing of prisoners of war; (*Specification 5*) conspiracy to commit the above offenses.

The Bill of Particulars listed eighty-six separate offenses, approximately one-half of which originated in the *Yamashita* Bills of Particulars.

The seven-member military tribunal had as its president a Brigadier of the Australian Army. Three of its members were from the Air Force, three from the Army, including the law member of the Tribunal. It is suggested that in so composing the court—adding a member of a foreign service as the President and a law member—General MacArthur sought to avoid further criticism based on command influence, such as was alleged in the *Yamashita* trial, as well as to gain a more carefully-worded judgment in the event the Tribunal was disposed to writing one.²³⁰

The Tribunal was so disposed and contributed to the law of command responsibility in three ways:

(1) It resolved certain factual questions rising from the *Yamashita* judgment. Because many of the charges against Admiral Toyoda were the same or similar charges as those for which General Yamashita was tried, the Tribunal heard the same evidence and reviewed the record of that trial, as well as those of thirty-

²³⁰ The correspondence file contained with the *Yamashita* record of trial, as well as the personal correspondence records of General MacArthur and his personal aide and confidant, BGen. Courtney Whitney, reveal an on-going flurry of correspondence over the concern over the *Yamashita* trial, which continued for some five years thereafter, spurred on initially by the dissenting opinions of Justices Murphy and Rutledge, then renewed by publication of Frank Reel's book in 1949 and General MacArthur's refusal to permit its publication in Japan. While these particular matters were not specifically addressed in any of the memoranda contained in these files, it is believed that they were viewed as reasonable improvements in the military tribunal system, particularly since Admiral Toyoda was an officer of even greater prominence, on trial in Tokyo rather than Manila, in a post-war Japan in which General MacArthur was making every effort to win the confidence and respect of the people. In the trial of General Yamashita, in contrast, General MacArthur's concern was for the Filipinos.

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one other trials which the Tribunal deemed might have some relevance to or bearing on the trial of Admiral Toyoda.

The first point concerned command responsibility for the naval forces which perpetrated the "Rape of Manila." The defense in *Yamashita* maintained that while General Yamashita had operational control of those forces, administrative control flowed through a naval chain of command and it was through this latter chain of command that any responsibility should flow. The Tribunal, in addressing this point, declared:

This Tribunal is convinced — as were the Commissions in the trials of Yamashita, Muta, and Yokoyama, with the conclusions of which this Tribunal can find no point of major issue — that these naval personnel were both legally and in fact commanded by the Japanese Army at the times and under the conditions here under consideration.²³¹

After carefully documenting and delineating the joint army-navy agreements²³² which provided for this command arrangement, the Tribunal concluded:

The Tribunal concludes that the so-called "Rape of Manila" was perpetrated by a force of 22,000 men, some 20,000 of whom were Navy personnel, under Rear Admiral Iwabuchi, the commander of the operation, who was under command of General Yokoyama, Commanding General of the Shimbu Shudan. The naval command channel . . . is not evident and the Tribunal cannot but conclude that it did not, in fact, exist. The much disputed definition of operational and administrative authority is not a point of issue here. The practicabilities of the situation, the obligations and duties of the immediate command, must be viewed with realism. The responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own. Whatever theoretical division of such responsibility may have been propounded, it is, in fact, impossible of delineation in the heat of "trial by fire."²³³

The second point of factual significance dealt with clarification of the issue of knowledge raised by the wording of the judgment of the commission in *Yamashita*. The Tribunal stated:

It is not within the province of this Tribunal to comment on the action of the United States Supreme Court taken in the cases of General Yamashita and Lieutenant General Homma Their lives were not forfeited because their forces had been vanquished on the field of battle but because they did not attempt to prevent, even to the extent of issuing orders, the actions of their sub-

²³¹ 19 United States v. Soemu Toyoda 5011 [Official transcript of Record of trial].

²³² *Id.* at 5011, 5013.

²³³ *Id.* at 5012.

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ordinates, of which actions the commanders must have had knowledge.²³⁴

(2) In addressing the question of command responsibility, the Tribunal determined, after review of the trials which had preceded it, what it considered the essential elements of command responsibility to be:

1. That offenses, commonly recognized as atrocities, were committed by troops of his command;

2. The ordering of such atrocities.

In the absence of proof beyond a reasonable doubt of the issuance of orders then the essential elements of command responsibility are:

1. As before, that atrocities were actually committed;

2. Notice of the commission thereof. This notice may be either:

- a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or

- b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.

3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.

4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.

5. Failure to punish offenders.

In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.²³⁵

(3) The Tribunal re-emphasized the practical limitations of command responsibility, reviewing those subjective factors which would determine whether a commander knew or had the means to know of the commission of offenses by units subordinate to him. By so doing, it refused to accept the vicarious responsibility or strict liability theory which *Yamashita* purportedly established:

In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander, consideration must be given to many factors. The theory is simple, its application is

²³⁴ *Id.* at 5005.

²³⁵ *Id.* at 5005-5006.

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not. One must not lose sight of the facts that even during the accused's period as Commander-in-Chief of Yokosuka Naval District, his nation had already begun to lose battles, its navy and, indeed, the war. The climax was being reached. His duty as a commander included his duty to control his troops, to take necessary steps to prevent commission by them of atrocities, and to punish offenders. His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain.²³⁶

Admiral Toyoda was acquitted of all charges.

H. OTHER TRIALS

The trials of lesser commanders support the general body of law conceived by the preceding tribunals. General Anton Dostler, tried by United States military commission in Rome,²³⁷ and Generals Mueller and Braver, tried by Greek court-martial in Athens,²³⁸ were convicted of ordering subordinates to commit war crimes. General Kurt Meyer, tried before a Canadian military tribunal, was convicted of "inciting and counselling" troops under his command to execute prisoners of war.²³⁹ In the *Essen Lynching* case, German Captain Erich Heyer gave instructions to a prisoner escort—before a crowd of angry townspeople—that the three Allied prisoners of war in his custody were to be taken to a Luftwaffe unit for interrogation. He ordered the escort not to interfere if the townspeople attempted to molest the prisoners, adding that the prisoners would or should be shot. The townspeople subsequently murdered the prisoners as the escort stood by. Heyer was sentenced to death for inciting the offenses.²⁴⁰ An unidentified commander was reportedly found responsible for the murder of partisans, following his issuance of an order which read in part: "I will protect any commander who exceeds usual restraint in the choice and severity of the means he adopts while fighting partisans."²⁴¹

Lieutenant General Harukei Isayama was convicted by a United States military commission in Shanghai of permitting,

²³⁶ *Id.* at 5006.

²³⁷ I L.R.T.W.C. 22.

²³⁸ XV L.R.T.W.C. 62.

²³⁹ IV L.R.T.W.C. 97.

²⁴⁰ I L.R.T.W.C. 88.

²⁴¹ VIII L.R.T.W.C. 10.

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authorizing, and directing an "illegal, unfair, unwarranted and false trial" before a Japanese court-martial of American prisoners of war.²⁴² Yuicki Sakamoto was convicted by a United States military commission in Yokohama for "permitting members of his command to commit cruel and brutal atrocities" against American prisoners of war.²⁴³ Lieutenant General Yoshio Tachibana and Major Suetō Matoba of the Japanese Army and Vice-Admiral Kunizo Mori, Captain Shizuo Yoshii and Lieutenant Jisuro Sujeyoshi of the Japanese Navy were tried and convicted of like charges by a United States military commission at Guam,²⁴⁴ as were General Hitoshi Imamura and Lieutenant General Masao Baba by Australian military courts sitting at Rabaul.²⁴⁵ In a trial by British military court at Wuppertal, Germany, Major Karl Rauer was charged with neglect in the treatment of prisoners of war. Subordinates of Major Rauer were charged with and convicted of illegally executing British prisoners of war, then returning to report to Rauer the prisoner's death "while attempting to escape." Major Rauer was acquitted of the first charge, but convicted of the latter two, the court feeling that it was less reasonable for Rauer to believe after the second incident that the prisoners involved were shot while trying to escape, and that measures should have been taken to investigate and prevent repetition of the incident.²⁴⁶

The cases dealt with crimes committed in the commanding officer's absence. Major General Shigeru Sawada was tried by United States Military Commission in Shanghai for permitting the illegal trial and execution of three United States airmen. The trial occurred in General Sawada's absence; informed of the trial and its results, Sawada endorsed the record and forwarded it to the chain of command, making only verbal protest of the severity of the death sentences, which were subsequently carried out. The Court held General Sawada had ratified the illegal acts which occurred in his absence and therefore bore the responsibility for them.²⁴⁷ General Tanaka Hisakasu was tried by similar Commission at Shanghai for the trial and execution of an American aviator, both of which occurred in his absence. Convicted by the Commission and sentenced to death, the findings and sentence were disapproved by the confirming authority on the basis of insuffi-

²⁴² V L.R.T.W.C. 60.

²⁴³ IV L.R.T.W.C. 86.

²⁴⁴ IV L.R.T.W.C. 86.

²⁴⁵ IV L.R.T.W.C. 87.

²⁴⁶ IV L.R.T.W.C. 113.

²⁴⁷ V L.R.T.W.C. 1.

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ciency of evidence of wrongful knowledge on his part.²⁴⁸ Evidence of what action he took to punish his subordinates for this crime was apparently not raised or presented.

One case dealt with the question of responsibility for passing illegal orders. In the *Jaluit Atoll* case, a lieutenant in the Japanese Navy received an order from Rear Admiral Nisuke Masuda to execute three American aviators, an order which the lieutenant, the custodian of the prisoners, passed to three warrant officers who carried out the order. The warrant officers received death sentences; the lieutenant, ten years' imprisonment.²⁴⁹

Virtually simultaneous with the trial of General Yamashita occurred the trial of General Masaharu Homma, Japanese commander in the Philippines at the time of the Bataan Death March.²⁵⁰ The evidence established that of 70,000 American and Filipino prisoners taken in the surrender of Bataan Peninsula on April 8-9, 1942, in excess of 10,000—2,000 American and 8,000 Filipino—were executed or perished from maltreatment during the 120-kilometer march from Mariveles to San Fernando.²⁵¹ Other charges alleged and proved included massacre of 400 Filipino soldiers on April 12, 1945; failure to provide adequate prisoner of war facilities, illegal prisoner of war labor, torture and execution of civilian internees, refusal to accept the surrender of enemy forces, bombing of hospitals, and bombing of an open city (Manila).²⁵² Tried in the Philippines by a United States military commission convened by General MacArthur, General Homma was found guilty of permitting members of his command to commit "brutal atrocities and other high crimes."²⁵³ An appeal to the Supreme Court of the United States was unsuccessful.²⁵⁴ In confirming the death sentence of General Homma, Gen-

²⁴⁸ V L.R.T.W.C. 66.

²⁴⁹ I L.R.T.W.C. 71. Admiral Masuda committed suicide prior to trial.

²⁵⁰ General Homma was arraigned on December 9, 1945; trial commenced on January 3, 1946, concluding February 11, 1946. He was acquitted of an additional charge which alleged that he refused to accept the surrender of United States forces on Corregidor and adjacent fortified islands on May 6, 1942.

²⁵¹ Review of the Theater Staff Judge Advocate of the Record of Trial by Military Commission of Masaharu Homma, Lieutenant General, Imperial Japanese Army, General Headquarters, Supreme Commander for the Allied Powers, March 5, 1946, pp. 2-3.

²⁵² *Id.* at 6-13.

²⁵³ *Id.* at 1.

²⁵⁴ *In re Homma*, 327 U.S. 759 (1946). The majority filed no opinion in denying General Homma's appeal. Justices Murphy and Rutledge filed dissenting opinions attacking the haste with which the case was brought to trial. Both the Supreme Court and the military commission reached decision

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eral MacArthur, a commander for forty-four years at that time, commented aptly in conclusion of this chapter:

Soldiers of an army invariably reflect the attitude of their general. The leader is the essence. Isolated cases of rapine may well be exceptional but widespread and continuing abuse can only be a fixed responsibility of highest field authority. Resultant liability is commensurate with resultant crime. To hold otherwise would prevaricate the fundamental nature of the command function. This imposes no new hazard on a commander, no new limitation on his power. He has always, and properly, been subject to due process of law. Powerful as he may become in time of war, he still is not an autocratic or absolute, he still remains responsible before the bar of universal justice²⁵⁵

I. SUMMARY

The trials upon the conclusion of World War II gave international application on a major scale²⁵⁶ to a custom first given sub-

on February 11, 1946, one week after the Supreme Court had rendered its decision in *Yamashita*.

²⁵⁵ D. MACARTHUR, REMINISCENCES 298 (1964). BERGAMINI, *supra* n. 76 at p. 956-959 insists that General Homma was a scapegoat for Emperor Hirohito, who either ordered the Death March or permitted it. Says Bergamini (at p. 956): "knowledgeable former members of the Japanese General Staff place the entire responsibility for the Death March on these unwanted helpers: '[Colonel] Tsuji [Massanobu] and the China gang,' on 'staff officers from Imperial Headquarters,' on 'experts in Yen Hsi-shan operations'." General Homma was merely an automaton.

²⁵⁶ Japanese figures indicate 4,000 suspects were tried by United States, British, Australian, and Chinese military tribunals. Eight hundred were acquitted, 2,400 were sentenced to three years or more imprisonment, and 809 were executed. BERGAMINI, *supra* n. 76, at 1109. Bergamini states the last figure includes 802 "minor" and seven "major" war criminals. He apparently considers only the seven defendants condemned by the Tokyo Tribunal (Dohiharu, Hirota, Itagaki, Kimura, Matsui, Muto, and Tojo) and not Generals Masaharu Homma and Tomoyuki Yamashita as "major" war criminals, even though General Akira Muto was General Yamashita's subordinate.

Between 1945 and March 1948 some 1,000 cases involving 3,500 persons were tried on the European continent before Allied courts. United States courts in Nuremberg from July 1945 to July 1949 tried 199 persons, of whom 38 were acquitted, 36 sentenced to death (18 were executed), 23 to sentences of life imprisonment, and 102 to shorter terms. American courts in Dachau sentenced 420 to death. Official German sources had recorded the following statistics through 1963:

American courts: 1,814 convicted; 450 given death sentence

British courts: 1,085 convicted; 240 given death sentence

French courts: 2,107 convicted; 104 given death sentence

German authorities estimate the Soviet Union convicted some 10,000 persons of war crimes. Germany itself through 1963 had arraigned 12,846 persons of whom 5,426 were convicted. E. DAVIDSON, *THE TRIAL OF THE GERMANS* 28-30 (1966).

These trials are continuing. On May 1, 1973, Hermine Braunsteiner Ryan, 53, an Austrian-born housewife from Queens, New York,

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stantial recognition by its codification in Hague Convention IV of 1907. While that custom—an imposition of responsibility upon a commander for the illegal acts of his subordinates—existed prior to World War II, it was the action of commanders and national leaders during that conflict which so shocked the conscience of the world as to demand a strict accounting for the commencement and conduct of those hostilities. Seldom have judges been appointed to the bench with such a clear mandate of public opinion as were the judges of the World War II tribunals. The law of war, and as a part thereof the law of command responsibility, witnessed great progression through definition and delineation, perhaps reaching a high water mark as international jurists concentrated their efforts on the subject. In this sense the law of war is like all other parts of international law in its progression: "Its principles are expanded and liberalized by the spirit of the age . . . Cases, as they arise under it, must be brought to the test of enlightened reason and of liberal principles. . . ." ²⁵⁷

III. THE STANDARD DEFINED

Acceptance of command clearly imposes upon the commander a duty to supervise and control the conduct of his subordinates in accordance with existing principles of the law of war. Equally clear, a commander who orders or directs the commission of war crimes shares the guilt of the actual perpetrators of the offense. This is true whether the order originates with that commander or is an order patently illegal passed from a higher command through the accused commander to his subordinates. Only the *genre* of culpability may distinguish the commander from those members of his command accused of committing the war crimes for which he is charged.

A. INCITEMENT

No less clear is the responsibility of the commander who incites others to act, although there may be extremes in examples in such

was ordered extradited to West Germany to stand trial for war crimes (murder of more than 1,700 women and children) allegedly committed by her as the head female guard at Ravensbruck prison camp in Germany and Majdanek in Poland. Ross, *Extradition of Ex-Nazi Is Ordered*, Wash. Post, May 2, 1973, at A-13. Also see *In re Extradition of Ryan*, 360 F. Supp. 270 (E.D.N.Y. 1973), aff'd 478 F.2d 1397 (2d Cir. 1973).

²⁵⁷ Bergman v. DeSieyes, 71 F. Supp. 334, 337 (S.D.N.Y. 1946).

a case. In the *Essen Lynching* case, by ordering his men before an angry crowd not to interfere if the crowd attempted to mistreat prisoners in their custody, Captain Heyer knowingly incited (a) an abandonment of responsibility by his subordinates and (b) perpetration of the main offense by persons not members of his command, resulting in the deaths of the prisoners. Would his incitement (and responsibility) be as clear had it been shown that (rather than the events occurring as they did) these same soldiers, while never receiving an order from Captain Heyer to neglect their responsibilities, nevertheless had heard him say that "the only good prisoner is a dead one," or refer to the enemy through racial epithets imputing to the enemy a less than human quality or status? *Black's Law Dictionary* defines "incite" as: "to arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion."²⁵⁸ Webster's defines "incite" as "to move to a course of action; stir up; spur on; urge on."²⁵⁹ Certainly it would depend on the circumstances of the remark, the recipient, and whether the perpetrator of the offense charged to have occurred as a result of the alleged incitement was the intended recipient. The passing remark by the twenty-four year old company commander to his twenty-three year old executive officer over a drink certainly would not have the same effect as if that same company commander were briefing his troop for a combat assault—troops eighteen years old who have been trained to respect and obey every word uttered by their company commander. While the qualification, "unless illegal" should be added to the last sentence, this does not take into account the impressionability of the young soldier. Even where a commander's comments are in jest and intended as casual remarks for the ears of the executive officer or the company first sergeant, such remarks, particularly where repeated with some frequency, could lead to questions of incitement where overheard by the "casual private first class" who then carries them back to the barracks. Here the incitement abandons the normal image of an explosive, motivating harangue for the subtle suggestion of toleration of certain offenses. While it would be most difficult to attach criminal responsibility to such casual remarks overheard by the unintended eavesdropper, the impact on the subconscious of the young eavesdropper who subsequently finds himself in custody of a "mere ———" on a lonely trail cannot be under-

²⁵⁸ BLACK'S LAW DICTIONARY 905 (4th ed. 1951) [Emphasis added].

²⁵⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1142 (1966) [Emphasis added].

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estimated. While it is most unlikely that criminal responsibility would attach for such a casual remark or remarks, it is nevertheless asserted — for moral and military mission reasons, if not legal²⁶⁰ — that the commander's responsibility lies or should lie in affirmatively manifesting an intolerance for illegal acts under any and all circumstances; and that the dividing line between moral and legal responsibility as it relates to incitement of others to act is a fine one. This dividing line could move depending on the tactical situation of the commander and his command; the casual remarks of the commander of a maintenance unit in a conventional war would seem to have less impact than those of an infantry company commander in a counterinsurgency environment. Even when remarks which incite violate a legal responsibility, the degree of culpability may vary. Captain Heyer was found to be a principal for his remarks and as a result received a death sentence; while his remarks were not tantamount to orders, they were (a) given with the intent of inciting and (b) with full knowledge of the probable consequences. The single or even occasional cast-off remark would not normally indicate the same intent nor awareness of the possible circumstances, although it could amount to personal dereliction on the part of a commander if shown that he should have anticipated the probable consequences;²⁶¹ and, taken

²⁶⁰ The concept of intolerance of war crimes in order to accomplish the mission is simply one of not making unnecessary enemies (the civilian population) who will thus detract you through partisan warfare from your primary mission, or of giving the natural enemy cause to fight harder (the enemy soldier who believes he will die if taken prisoner will fight harder not to be taken prisoner). While the Vietnam "winning the hearts and minds of the people" program of civic action is the most recent example of this concept, Emperor Meiji of Japan, in his "Rescript to Soldiers and Sailors" of January 4, 1883, admonished:

Those who appreciate true valor should in their daily intercourse set gentleness first and aim to win the love and esteem of others. If you affect valor and act with violence, the world will in the end detest you and look upon you as wild beasts. Of this you should take heed.

(HEINL, *supra* n. 15 at 172). Similarly, Sir Philip Sidney (1554-1586) declared: "Cruelty in war buyest conquest at the dearest price." (*Id.* at 20).

²⁶¹ In this situation the dereliction may be one of the commander not knowing his troops. U.S. DEPT OF ARMY, FIELD MANUAL 101-5, OPERATIONS OF ARMY FORCES IN THE FIELD, provides at paragraph 3-5:

3-5 THE HUMAN ELEMENT

Despite advances in technology, man remains the most essential element on the battlefield. The commander must be acutely sensitive to the physical and mental condition of his troops, and his plans must take account of their strengths and weaknesses. He must make allowance for the stresses and strains the human mind and body are subjected to in combat. His actions must inspire and motivate his command with the will to succeed under the most adverse

alone, would only under the rarest circumstances be sufficient to find its speaker responsible, assuming a direct correlation between remark and act could be made. Thus, the degree of criminal responsibility may vary from the situation where the remarks of incitement are synonymous with orders as opposed to the situation where such remarks are unintended in the context received and erroneously perceived as a manifestation of acquiescence on the part of the speaker. The degree of responsibility is determinative of the degree of culpability, and is of particular significance where the misconduct charged is alleged to constitute a "grave breach" as that term is defined in the 1949 Geneva Conventions.²⁶²

B. ACQUIESCENCE

A commander who is shown to have knowledge of offenses which have occurred within his command may be found responsible to some degree for those offenses where he has manifested acquiescence in their commission. Responsibility may vary from that of a principal to dereliction of duty; the degree of culpability will be correlative to the degree of acquiescence, or better said, to the degree of manifestation of intent to join or assist the principals in perpetration of the primary offense. There is little difficulty with the situation where the commander takes no action, or where by his action he clearly manifests an intent to aid the commission of the offense after the fact; the difficulty lies in establishing a causal connection where acquiescence is due to dereliction of duty rather than a manifestation of specific intent. The commander is deemed to share responsibility where he has knowledge of an offense and fails to take reasonable corrective action. Assuming the principal offense and the commander's knowledge thereof are established, the commander would be responsible if (a) he took no action, either intentionally or through personal dereliction; or (b) the action taken is within the control of the commander and is patently disproportionate to the offense committed as to result in acquiescence therein.

conditions. He must assure his troops that hardship and sacrifice will not be needlessly imposed and that their well-being is of primary concern to him.

²⁶² Articles 146-148, Geneva Convention Relative to the Protection of Civilians; Articles 129-131, Geneva Convention Relative to the Treatment of Prisoners of War; Articles 49-51, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; and Articles 50-52, Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

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Thus a commander would not be responsible if an accused is referred to a general court-martial for murder of a noncombatant and is either acquitted or receives what on its surface appears to be a light sentence, unless there is established a pattern of such trials which would indicate that they have been no more than a sham or facade; but the commander who punishes the same accused through nonjudicial punishment (given circumstances indicating guilt of the offense charged) would be no less responsible than the one who awards no punishment. Any such acquiescence must be blatant in character rather than speculative "second guessing" after the fact.

Field Manual 27-10 fairly states the commander's duty relative to this point: "Commanding officers . . . must insure that war crimes committed by members of their forces . . . are promptly and adequately punished." ²⁶³

While this represents a statement of the commander's duty, in seeking an answer to any question of a commander's acquiescence a reverse tack is required. Current British military law states this point by considering a commander to have acquiesced in an offense "if he fails to use the means at his disposal to insure compliance with the law of war;" ²⁶⁴ in comment it continues:

The failure to do so raises the presumption — which for the sake of the effectiveness of the law cannot be regarded as easily rebuttable — of authorisation [sic], encouragement, connivance, acquiescence, or subsequent ratification of the criminal acts.²⁶⁵

Field Manual 27-10 similarly provides that a commander may be responsible under a theory of acquiescence "if he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violations thereof." ²⁶⁶ Both the British "means at his disposal" test and the "necessary and reasonable" language of FM 27-10 suggest that, rather than estab-

²⁶³ [Emphasis supplied.] Paragraph 507(b) strangely urges prompt and adequate punishment of war crimes committed against enemy personnel only; the admonishment applies regardless of the victim.

²⁶⁴ *Supra* n. 58 at paragraph 631.

²⁶⁵ *Id.* at n. 1. The note continues (after citing *Yamashita* as the principal case on acquiescence):

The principle has also been recognized in the legislation regarding war crimes of some countries. However, it is probable that the responsibility of the commander goes beyond the duty as formulated above. He is also responsible if he fails, negligently or deliberately, to ensure by the means at his disposal that the guilty are brought to trial, deprived of their command or ordered out of the theater of war, as appropriate. [Emphasis supplied].

²⁶⁶ Para. 501, FM 27-10 (1956).

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lishing an absolute norm, the actions of the commander under the circumstances extant at the time of the discovery of the offense will determine whether he is deemed to have acquiesced in the offense.²⁶⁷ To the commander whose forces are heavily engaged in an intense operation or pitched battle, no reasonable means may exist to secure prompt punishment of an offense prior to conclusion of that engagement; absent disengagement, there would come a point where some action must be taken against an alleged perpetrator of an offense regardless of the circumstances of the campaign, or where there has been sufficient disengagement from the campaign for the commander to turn his attention to matters other than tactics.²⁶⁸ Put another way, the theory of prompt investigation, trial and punishment will be more stringently applied to a commander in a static tactical situation than one in a very fluid, fast-moving situation requiring complete devotion to accomplishment of the mission at hand.²⁶⁹

²⁶⁷ The French and Luxemborg criteria of "tolerated" used immediately after World War II would seem to be in agreement with the British and United States views, while the Netherlands criteria of that period ("deliberately permitted") appears higher. Cf. the Netherlands proposed standard in n. 296 *infra*. The Republic of Zaire, in its Code of Military Justice of 1972, provides at Paragraph 502 that "(S)uperiors can . . . be considered accomplices to the crime to the extent that they organized or tolerated the (war) crimes of their subordinates." Article II of the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity (U. N. G. A. Res. 2391 [XXIII] December 9, 1968) provides that "(T)he provisions of this Convention shall apply to representatives of the state authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the state authority who tolerate their commission."

²⁶⁸ This is particularly true today with the staff support which the commander receives. In proceeding against a member of his command accused of war crimes, there are few matters which require the personal attention or decision of the commander. With judge advocates assigned as special staff officers down to and including brigade or regimental level (the Marine Corps has non-lawyer legal officers at battalion level), and assuming adequate investigative services are available, it would seem that the tactical circumstances would most affect the company grade commander. Availability of staff assistance is perhaps most illustrative of the "means at his disposal" test.

²⁶⁹ Care should be exercised in reading the preceding statement, as it addresses only the subjective standard to be utilized in weighing a commander's conformance with the laws of war; it in no way suggests that under any circumstances are those standards decreased.

Within individual units, the tactical situation may fluctuate rapidly and unexpectedly. Allied commanders on D-Day, June 6, 1944, were of necessity completely involved in mission accomplishment; thereafter their responsibility for prompt investigation, trial and punishment of any alleged offense became of more paramount concern. Initiation of the German Ardennes

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C. Command and Control

The post-World War II tribunals concluded that responsibility for *control* of a unit existed with *command* of that unit, for example, the commander had the duty to control those troops and units subordinate to him in his command. These tribunals found that identification with and responsibility for certain units by particular commanders was not always clearly defined.

The tribunals in their examination of this point in *Yamashita*, *Von Leeb*, and *List* are in agreement that where a commander exercises executive power over occupied territory, he is responsible for acts committed within his area of responsibility regardless of whether a unit is subordinated to his command or not. As the commander bearing executive power, he is charged with responsibility for maintaining peace and order within the area over which his executive authority extends, and the duty of crime prevention rests upon him.²⁷⁰

In *List* the Tribunal deftly avoided the question of responsibility of the commander possessed solely of tactical command, noting in such case that the "matter of subordination of units as a basis for fixing criminal responsibility becomes important."²⁷¹ No difficulty in ascertaining responsibility exists where the tactical commander exercises both operational and administrative control; all authority and responsibility is vested in the single command. The question raised, but unanswered in *List*, addresses the splitting of operational and administrative control — tactical control reposed in one commander, with the authority to punish in another, as alleged in *Yamashita* regarding the atrocities committed by naval troops in Manila. Setting aside the responsibility of the tactical commander in whom executive autho-

Counteroffensive on December 16, 1944, affected the commander's ability to obtain prompt investigation, trial and punishment of an accused as well as his personal ability to concentrate his attention on disciplinary matters. A similar reasonable shifting of priorities would be exemplified by the United States Marine amphibious assault at Inchon, Korea, on September 15, 1950; the subsequent strategic withdrawal from the Chosin Reservoir, commencing December 1, 1950; as compared with the relatively stable six-month-period from October 1952 to March 1953 when Marine units formed a part of the United Nations Command line. The preoccupation of the commander with strictly tactical matters in the first two instances is much more significant than in the latter.

²⁷⁰ This responsibility is not exclusive but concurrent with that of unit commanders, whether tactically subordinate to the area commander or not, and under normal circumstances would be superior in authority to that of those unit commanders.

²⁷¹ *Supra* n. 195 at 1260.

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rity also was vested, to what degree can a commander be said to be responsible for the acts of subordinate units over which he exercises only operational control? The Supreme Court in *Yamashita* discussed responsibility for failure of a commander to take such measures as were within his *power* rather than his *authority*.²⁷² The Tribunal in *Toyoda*, all professional military officers, did not view any such division of authority as realistically giving rise to any control problems:

The responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own. Whatever theoretical division of such responsibility may have been propounded, it is, in fact, impossible for delineation in the heat of "trial by fire."²⁷³

Thus, where a tactical commander has only operational control of a subordinate unit and not the authority to relieve or punish the subordinate commander, he will be expected to take such measures as are within his physical power under the circumstances to prevent or stop war crimes by that subordinate commander. It is the commander's responsibility to take all measures possible to prevent the commission of war crimes by subordinates; lack of administrative control and hence normal administrative remedies does not foreclose or preclude use of other measures.

For example, assume an infantry battalion is operating with an artillery battery attached. Because of operational exigencies, the battery is under operational control of the infantry battalion but under administrative control of its parent (artillery) battalion. The battery commander is authorized to fire only those missions requested by the supported unit. The battery commander receives a fire mission from another unit or from his parent artillery unit which is patently in violation of the rules of engagement or otherwise violates the laws of war, and the battery commander indicates he will fire the mission. On monitoring of that message in the supported infantry battalion's fire support coordination center by the infantry battalion commander or his representative, there is no question that he has the *duty*, the *authority*, and the *power* to prevent the perpetration of that offense. While certainly this example is more easily solved under our bureaucratic command system than the pluralistic system of the Third Reich, and less complex than that with which General

²⁷² *Supra* n. 107 at 15.

²⁷³ *Supra* n. 231 at 5012.

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Yamashita was confronted, it nevertheless seems to be the only reasonable result or conclusion which can be reached. It seems unconscionable in the example given that the infantry battalion commander could forego his responsibility by pleading a lack of administrative authority over the attached battery so long as he has the means of preventing perpetration of the offense.²⁷⁴

Other situations pose similarly perplexing problems. Assume a commander is assigned a tactical area of operation over which he exercises no executive authority. Other forces — whether allied forces from a third nation, forces of the host nation, or other United States forces — enter that area obviously bent on the commission of war crimes, for example, announcing openly the taking and execution of hostages. Certainly a duty exists to exercise those means within his control to prevent the intended acts, even if those means are limited to notification of his superiors in an effort of reaching a common commander with authority to prevent the offense, or to report those offenses if unsuccessful in their prevention; yet the degree of duty and commensurate liability for violation thereof, particularly where allied troops are involved, is not clearly defined. Article 1 of the Geneva Conventions of 1949 requires that all signatories thereto "respect" and "ensure respect" for the Conventions "in all circumstances." This language has been determined to be permissive rather than mandatory, however.²⁷⁵ While Articles 13 and 16 of the Geneva Civilian Convention, taken together, require a signatory nation to assist, protect and respect, as far as military considerations allow, "persons exposed to grave danger," it has been said that Article 4 of the Convention emasculates any duty of the individual commander to intervene by suggesting that any intervention be conducted through normal diplomatic channels.²⁷⁶ Insofar as that duty exists with regard to other American units, Field Manual 27-10 provides that:

²⁷⁴ Responsibility in this case would not be exclusive. Where the requested fire mission comes from a separate unit, the artillery battalion commander has a two-fold responsibility (assuming he has knowledge before the mission is fired): (a) to use all means reasonably available to prevent the firing of the mission, and (b) to punish those responsible in the battery for commission of the offense.

²⁷⁵ IV PICTET, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 16 (1958); PAUST, *supra* n. 4 at 57 MIL. L. REV. 157.

²⁷⁶ PAUST, *supra* n. 4 at 57 MIL. L. REV. 158.

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The commander is . . . responsible if he has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war²⁷⁷

Combining this definition with the previously-cited British "means at his disposal" test, it would seem the commander with means of controlling the commission of war crimes has a duty to do so, not only within his own command but within his area of operations and command.

While not a commander, an adviser to an allied unit may be said to have a duty to prevent the commission of war crimes by the unit to which he is assigned because of his unique position within that unit. If, for example, an advisor should come upon a situation in which members of his advisee unit were about to commit a war crime, while lacking the authority to control the conduct of those forces, his means of otherwise preventing the commission of the offense are not entirely foreclosed. After protesting to the unit commander (assuming without success), he has the means to notify his next higher command by separate radio net — again in hopes of reaching a common senior headquarters that can prevent the offense. If the offense occurs, he has the limited means of preventing its reoccurrence by (a) reporting its occurrence and (b) seeking relief from his role as adviser to that unit, should the circumstances warrant. The latter suggestion not only follows the alternatives proposed in the *Tokyo* and *Von Leeb* trials, but would appear to be the practical solution where the rapport between the adviser and the advisee unit commander has been seriously jeopardized by their clash. The circumstances for relief as well as any question of acquiescence on the part of any adviser who remains with the unit would depend entirely on the circumstances and severity of the incident, however. The situation is not unlike that which the Tokyo Tribunal found in convicting Lieutenant General Akira Muto of war crimes perpetrated as General Yamashita's Chief of Staff: while not in the precise position in which the adviser finds himself, he was found criminally responsible inasmuch as he was deemed to have had the means to influence substantially command decisions; thus failure to utilize all means available to prevent the perpetration of war crimes may legitimately raise questions of criminal responsibility.

²⁷⁷ *Supra* n. 57 at para. 501.

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D. Knowledge

Given the established duty of a commander to control the conduct of his subordinates, responsibility for such conduct exists where the commander has or should have had knowledge of offenses and fails to act. Because of *Yamashita*, or what might be called the "popular" view of what *Yamashita* purportedly represents, this has been a point begging resolution. It is submitted that the difficulty lies not with *Yamashita* but in what a minority with vested interests claim *Yamashita* represents.

This so-called popular view, based on the writings of General Yamashita's defense counsel, Frank Reel, and the current writings of Telford Taylor, is that a commander may be convicted for the war crimes of a subordinate on the basis of *respondeat superior*, without any showing of knowledge. As previously noted, this theory was argued unsuccessfully by Telford Taylor at Nuremberg and was also rejected by the Tokyo Tribunal. The theory ignores the basic charge against General Yamashita that he

... unlawfully disregarded and failed to discharge his duty to control the operation of the members of his command, *permitting* them to commit brutal atrocities and other high crimes . . . ; and he thereby violated the laws of war.²⁷⁸

By definition, "permitting" implies knowledge of that which is permitted and acquiescence therein, which would suggest that the standard in *Yamashita* — of either knowledge or, possessing knowledge, of a failure to carry out the commander's duty to act — is no less nor more than that stated in the *High Command* case "... a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence."²⁷⁹

A recent discussion of *Yamashita* can be found in Professor Arthur Rovine's writings on command responsibility in *The Air War in Indochina*.²⁸⁰ In reviewing the Supreme Court's opinion in *Yamashita*, Professor Rovine stated:

Our view is that the *Yamashita* decision does not carry the weight assigned to it by ardent supporters or critics. At no point did the military commission or the Supreme Court hold that knowledge was irrelevant. It is true that the original decision by the commission did not make a specific finding of knowledge, but it did quote from and apparently accept prosecution evidence "to

²⁷⁸ *Supra* n. 71.

²⁷⁹ XI TWC 543-44.

²⁸⁰ THE AIR WAR IN INDOCHINA (Rev. ed. R. Littauer and N. Uphoff, 1972).

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show that the crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."

The Court refused to deal with the evidence on which General Yamashita was convicted, and did not deal with the question of knowledge one way or the other.

The Court did decide that the precise substantive question before it was whether the laws of war imposed on a military commander an obligation to take such appropriate measures as are within his power to control the troops under his command for the prevention of war crimes. The Court cited several provisions of conventional law to demonstrate the existence of an international legal obligation for the defendant amounting to an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.

The proposition of law which General Yamashita was held to have violated was thus formulated in a rather elliptical manner that avoided the element of knowledge while leaving it as a variable for consideration by the court of first instance. Given the significance of the issue and the punishment of death, it is regrettable that the Supreme Court did not present a full-scale analysis of the legal significance of a commander's knowledge, or lack of knowledge, of war crimes committed by his troops. But the unsatisfactory nature of the Court's opinion in 1946 is certainly not to be taken as a clear statement that there is command responsibility for crimes of which a commander has *no* knowledge.²⁸¹

After summarizing the *High Command* case, Professor Rovine concludes:

We think the *High Command Case* is far preferable to the Yamashita holding, because it deals clearly with a crucial issue—knowledge—rather than avoiding it, and because the doctrine it evokes appears to be more equitable and better law. Further, as an expression by an international tribunal rendering judgment in one of a large series of war-crimes trials, its legal weight is probably greater than a judgement (sic) even of the U.S. Supreme Court, at least in terms of formulating rules of international law. And, ironically, it is far more likely than the Supreme Court ruling to win acceptance in the United States, among lawyers, the public, and government and military decision-makers.²⁸²

Professor Rovine's comments lament the same point noted previously in this article — in rushing to try Generals Homma and Yamashita in order to placate his Filipino constituency, General MacArthur committed an equally great injustice to international law by failing to appoint a law member to those military tribunals. The resulting credence given the opinion of a lay jury is unprecedented and disproportionate in light of the number of

²⁸¹ *Id.* at 140-1.

²⁸² *Id.* at 141.

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high-ranking officers tried by tribunals whose membership included members of the bar.

Obviously, all trials will not deal with the question of knowledge to the degree that *Yamashita* did. Where knowledge is obvious, given the failure to act, the commander will be deemed responsible. In other cases, knowledge may be reasonably imputed. Thus, in *List* the Tribunal imputed knowledge to a commander where reports were received by his headquarters, stating as to General List:

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.²⁸³

Similarly, of General von Kuechler in the *High Command* case the Tribunal stated "It was his business to know, and we cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the [Commissar Order]." ²⁸⁴

These Tribunals, and it is submitted the Tokyo Tribunal in convicting General Muto and the Military Commission in convicting General Yamashita, further asserted that a commander may normally be presumed to have knowledge of offenses occurring within his area of responsibility while he is present therein. In addressing this point in the *Hostage* case, the Tribunal observed:

It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are unusual.²⁸⁵

The Canadian rule of 1945 reflects this.²⁸⁶

In discussing the responsibility of General von Roques for crimes committed within his area of responsibility, an area over

²⁸³ *Supra* n. 203.

²⁸⁴ *Supra* n. 151.

²⁸⁵ *Supra* n. 199.

²⁸⁶ *Supra* n. 55. Canadian rule 10(4) provides:

Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

which he also had executive power, the Tribunal in *von Leeb* placed this in perspective, quoting from *List*: "[A commander] cannot ignore obvious facts and plead ignorance as a defense."²⁸⁷

This is not a presumption to be rebutted by the commander, but a subjective element which the court in its discretion may consider. Where the commander denies actual knowledge of the offenses alleged, it is an imputation of *constructive knowledge* where it is established that under the circumstances he *must have known*. Other subjective elements will weigh heavily on the value placed on this factor in considering whether the commander so accused has been derelict in the performance of his duties, for example, in obtaining knowledge, and under the circumstances to what degree he shares the guilt of the principal accused.

The standard to this point may be stated as follows: A commander may be liable for the actions of his subordinates if: (a) he has actual knowledge that an offense has occurred, and he fails to punish the perpetrators of the offense or take reasonable preventive measures within his power to prevent reoccurrence; or (b) he failed to exercise the means available to him to learn of the offense and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction; or (c) there is sufficient evidence to impute knowledge.

E. SUBJECTIVE FACTORS

One author has suggested that (b) and (c) be ascertained by a "reasonable commander" standard.²⁸⁸ The difficulty with this suggestion is just as there is no such thing as a "reasonable man," there is no such thing as a "reasonable commander"; and that the variable of the circumstances of command are too great to be considered in one "pat" test. Rather than attempt to define the elusive, it is asserted that a number of subjective criteria be recognized and considered in ascertaining and imputing knowledge and responsibility. Although these criteria may also be considered in determining any question of acquiescence, they are considered here only with regard to resolution of any question of knowledge. These criteria include:

(1) *The rank of the accused.* This may serve as a two-edged sword, for while rank is gained through experience it also serves

²⁸⁷ *Supra* note 184.

²⁸⁸ O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605, 629 (1972).

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to isolate the commander from the everyday events of the battlefield.

(2) *Experience of the commander.* Ideally officers of equal rank are equal — in authority, responsibility, ability, and experience. Realistically nothing could be further from the truth. In the simplest of examples, a rifle company may be commanded by a captain with up to twelve years' commissioned service — experienced as a platoon leader, company executive officer, with additional professional schooling, and several years of experience as a company commander. The adjacent company may be commanded by another captain who by virtue of accelerated promotions in time of war may have only two years commissioned service, half of which was spent in training; or by a second lieutenant who joined the company, his first assignment, the day before as a platoon leader and who after a heavy assault finds he is the surviving officer in that company. Leadership comes not only from training but from experience; with it comes a sixth sense, an ability to anticipate problems before they arise as well as being cognizant of a greater variety of means or methods for dealing with or preventing them. Thus in the trial of General Yamashita the Commission specifically recognized the extensive and broad experience of the accused throughout the world in war and peace, in rejecting his plea of lack of knowledge.²⁸⁹ Similar consideration would be given to the personal and professional qualities of the commander — his intelligence, his education, the amount of time spent in staff duties as opposed to command positions, or vice-versa, as well as the charisma of the commander. The last point is most important, however much a will-o'-the-wisp it may be; the commander whose troops will follow him to hell and back certainly has greater means of knowledge, as well as control, simply by virtue of the personal dedication to him by his subordinates than the commander who lacks the ability to lead his troops to the chow line. Thus given like facts in all other factors a court in one case may find a commander should have had knowledge simply because he was a better commander than his acquitted counterpart in another case.²⁹⁰

²⁸⁹ *Supra* note 64 at 4060-1.

²⁹⁰ The result of this conclusion is that it encourages mediocrity, an argument which the author is hard pressed to refute. The result in actuality, however, is that while a higher standard of *expected* performance of duty may be considered in the case of a superior commander, the high standard prescribed by precedent may never be lowered to accommodate the mediocre performance of a less capable commander. The same encouragement of

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(3) *The duties of the commander by virtue of the command he held.* These considerations will extend not only to the type of command held by the commander but also to the operational commitments of that command. Thus it may be reasonable to conclude the commander of a stable support command should have had knowledge of an offense more readily than the infantry commander of a highly mobile and widely deployed unit. Similarly, the commander operating, for example, a battalion with supporting arms in general and even direct support is operating in a less complex environment than his counterpart operating with the same forces attached.

(4) *Mobility of the commander.* What the advent of the helicopter the commander has extended his means of knowledge. Yet a disparity exists from unit to unit. The commander of an air cavalry unit with a seeming overabundance of helicopters may be deemed to have a greater means of knowledge than his airborne counterpart who after initial deployment finds he is limited to the infantryman's traditional means of transportation — foot. While personal inspection of units certainly increases a commander's means of knowledge, the development of effective communications may have limited any argument of lack of mobility as a viable defense. It is nevertheless a point which deserves some consideration.

(5) *Isolation of the commander.* This concept goes hand-in-hand with its predecessor, the obvious example being the case of Admiral Toyoda, who was relegated to commanding a vast force covering the Pacific from a flagship anchored in home waters. In contrast commanders in Vietnam, if not actually on the ground with their command, hovered overhead in constant observation of the tactical situation. Isolation and mobility were usually capable of correction by a fifteen-minute helicopter flight. Yet that same commander could be virtually as isolated from his command as Admiral Toyoda by adverse weather conditions.

(6) *The "sliding probability ration" of unit/incident/command.* There certainly exists a sliding probability ratio, that is, the greater the size of the offense and/or the unit involved, the higher in the chain of command knowledge may be subjectively imputed. Obviously any one soldier can go out in a combat environment and murder an unarmed belligerent or noncombatant without

mediocracy exists under the "reasonable commander" rule, if not more so. Utilization of the subjective standards diminishes the likelihood of culpability turning on the one point.

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anyone knowing otherwise. The introduction of each additional person, whether co-participant, observer, or victim, increases the likelihood of discovery of the offense; and the greater the number of participants or victims, the higher in the chain of command that information is likely to reach — or the more likely that a court will impute knowledge to the accused commander. It is conceivable that a small patrol could commit murder and the information not reach above the platoon leader; in such case, involving one or two deaths, it would be difficult to impute knowledge to the division commander absent a showing of offenses systematic in nature. Yet if that patrol walks into a village and executes fifty noncombatants, or if a platoon or company is witness to the murder of one noncombatant, or if a platoon or company murders fifty noncombatants, it would be reasonable for a court to conclude that a division commander and intermediate commanders between the platoon or company and the division knew or should have known of the offenses. Dereliction in failing to learn of the isolated offense may thus be imputed only to those commanders at lower levels in direct contact with the situation; but a commander's duties include as part of the exercise of command supervision of subordinates to insure that orders are carried out fully and properly. Hence the greater the severity of the offense or the frequency of offenses, the higher up the chain of command knowledge may be imputed because of the commander's failure to carry out his supervisory responsibilities.

(7) *Size of the Staff of the Commander.* While the size of the staff directly affects the commander's means of knowledge, and while a court may give this consideration in imputing knowledge, a commander may not "shrink" his staff to avoid learning about activities. He cannot avoid that which is his duty.

(8) *Comprehensiveness of the Duties of the Staff of the Commander.* Depending on circumstances, the duties of the staff may vary considerably in their comprehensiveness, thereby varying the means of gaining knowledge. Thus the commander and his staff engaged in a complex amphibious operation will have less opportunity for gaining knowledge than they would during a sustained land campaign. This does not permit a commander and his staff to operate in a vacuum, however, ignoring the obvious.

(9) *Communications Abilities.* While arguments were made in the *Hostage Case*, the *High Command Case*, *Yamashita*, and by General Muto before the Tokyo Tribunal that inadequate com-

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munications were the cause of each accused's lack of knowledge, there was sufficient evidence to the contrary in each case for the court to reject this as a valid defense. Few commanders will permit their subordinates to lose contact with the command; and while communications (and hence the means of knowledge) may diminish, seldom will they cease. There is a disparity among units of equal level as well as units of different levels, however, and these variations in means should be taken into consideration by a court.

(10) *Training, Age and Experience of the Men Under His Command.* General Douglas MacArthur, in his *Annual Report of the Chief of Staff of the Army*, 1933, stated "In no other profession are the penalties for employing untrained personnel so appalling or so irrevocable as in the military."²⁹¹

Even earlier, General W. T. Sherman had said of the value of experience:

It was not until after Gettysburg and Vicksburg that the war professionally began. Then our men had learned in the dearest school on earth the simple lessons of war. Then we had brigades, divisions and corps which could be handled professionally, and it was then that we as professional soldiers could rightly be held to a just responsibility.²⁹²

Lack of training and experience is no excuse for the commission of war crimes, yet it may serve in the way of explanation should they occur and the commander argue his ignorance of their occurrence. This lack of training and experience may be deemed to put the commander on notice as to his additional responsibility of controlling untrained troops, for part of the identified responsibility of the commander is knowing his command, its capabilities and limitations.²⁹³

(11) *Composition of Forces Within the Command.* Yamashita emphasized one point: the joint or combined force is more difficult to control than the unified command, simply because of inter-service or international rivalries. Things are done differently; hence just as a commander may be limited in his control of such an "allied" force, so may his means of knowledge be similarly limited in scope.

(12) *Combat Situation.* The extremes are obvious, one being the relatively stable combat environment as opposed to the fluid, rapid-moving situation. Consideration must be given to these

²⁹¹ HEINL, *supra* n. 15 at 329.

²⁹² *Id.* at 168-9.

²⁹³ See n. 261, *supra*.

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degrees of engagement as they have perhaps the greatest effect on the commander's ability to obtain knowledge and hence the ability to control his subordinates.

F. The Standard of Knowledge

Almost universally the post-World War II tribunals concluded that a commander is responsible for offenses committed within his command if the evidence establishes that he had *actual knowledge* or *should have had knowledge*, and thereafter failed to act. This remains the standard today. Field Manual 27-10 states that:

The commander is . . . responsible, if he had *actual knowledge* or *should have had knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.²⁹⁴

Available information indicates the *knew or should have known* test was used by the Soviet Union in their war crimes trials after World War II and remains the Soviet standard of command responsibility.²⁹⁵ The Netherlands has proposed that the *knew or should have known* test be codified as the international standard for responsibility.²⁹⁶

G. The Degree of Negligence: Enough, Too Much, or Too Little?

While there appears to be agreement on the general acceptability of the *knew or should have known* test, the difficulty lies in establishing the point at which criminal liability attaches. In the words of the *High Command Case*, at what point has a commander been guilty of "a personal neglect . . . amounting to acquiescence?" In the absence of an international definition, examination of municipal standards is required.

²⁹⁴ *Supra* n. 57 at para. 501 (emphasis supplied).

²⁹⁵ Harbridge House Study, *supra* n. 6 at 22.

²⁹⁶ By CE/COM IV/45 the Netherlands recommended that the following paragraph be added to Draft Article 75 of International Committee of the Red Cross Draft Additional Protocol to the Four Geneva Conventions of August 12, 1949:

2. [The civilian and military authorities] shall be criminally liable for any failure on their part to take all those steps within their power to make an end to breaches of the laws of war which were, or ought to have been, within their knowledge.

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In order to determine the degree of negligence required for culpability, a review of the possible offenses is in order. Under Article 130 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War grave breaches of the Convention are described as

. . . *wilful* killing, torture or inhuman treatment, including biological experiments, *wilfully* causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or *wilfully* depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.²⁹⁷

Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War similarly defines grave breaches as

. . . *wilful* killing, torture or inhuman treatment, including biological experiments, *wilfully* causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or *wilfully* depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and *wantonly*.²⁹⁸

Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field contains similar language to the preceding provisions. Such grave breaches are punishable by a sentence up to and including a sentence of death.

The 1949 Conventions thus codify the apparent degree of negligence used in the *High Command Case*: ". . . a personal neglect amounting to *wanton*, immoral disregard of the action of his subordinates amounting to acquiescence."²⁹⁹

Thus precedent and present Conventions appear to indicate that in order to hold a commander responsible for grave breaches of these Conventions or of war crimes tried before an international tribunal, absent actual knowledge there must be either (a) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences; or (b) an imputation of constructive knowledge, that is,

²⁹⁷ Treaties and Other International Acts Series 3364 (Emphasis supplied).

²⁹⁸ Treaties and Other International Acts Series 3365 (Emphasis supplied).

²⁹⁹ XI TWC 543-544 (Emphasis supplied).

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that despite pleas to the contrary under the facts and circumstances of the case the commander must have known of the offenses charged and acquiesced therein.³⁰⁰ The question remains, particularly in light of the severity of the penalty for commission of a grave breach, if the standard should be lower.

Under domestic law, there exist three degrees of negligence:

(1) *Wanton*: This degree of negligence involves the doing of an inherently dangerous act or omission with a heedless disregard of the probable consequences.

(2) *Recklessness, Gross or Culpable Negligence*: Culpable negligence is a degree of carelessness greater than simple negligence.³⁰¹ It is a negligent act or omission accompanied by a culpable disregard for the foreseeable (but not necessarily probable) consequences to others of that act or omission.

(3) *Simple Negligence*: Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

It is submitted that only where there is a showing of *wanton* negligence has the commander manifested the *mens rea* to be held criminally responsible for the primary offense, that is, he has through his dereliction sufficiently aided and abetted the principals thereto as to make himself a principal or an accessory after the fact.

Article 77, Uniform Code of Military Justice, defines a "principal" as:

Any person . . . who—

- (1) commits an offense . . . , or aids, abets, counsels, commands, or procures its commission; or
- (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.³⁰²

³⁰⁰ Professor O'Brien, *supra* n. 288 at 649, utilizes an indirect/direct liability theory rather than the legal concept of imputed or constructive knowledge:

. . . if . . . violations are such as to reveal demonstrable direct or implied negligence on the part of the relevant commanders, command responsibility dictates indirect liability for the crimes. If it can be shown that the commanders must have been aware that torture and mistreatment were regularly practiced, . . . they become participants with direct responsibility added to their indirect liability.

³⁰¹ Para. 198b, *MANUAL FOR COURTS-MARTIAL*, 1969 (REV. ED.) [hereinafter cited as MCM, 1969 (Rev. ed.)].

³⁰² 10 U. S. C. § 877.

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In discussing Article 77 the *Manual for Courts-Martial* states:

To constitute one an aider and abettor under this article, and hence liable as a principal, mere presence at the scene is not enough nor is mere failure to prevent the commission of an offense; there must be an intent to aid or encourage the persons who commit the crime. *The aider and abettor must share the criminal intent or purpose of the perpetrator.*³⁰³

Article 78, UCMJ, Accessory after the Fact, states that

Any person . . . who, knowing that an offense . . . has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.³⁰⁴

In discussing Article 78, the *Manual* states that in addition to having actual knowledge that an offense has occurred "mere failure to report a known offense will not constitute one an accessory after the fact."³⁰⁵

Yet such failure to report will give rise to other liability, at least at the domestic level. Article 1139, Navy Regulations, states:

Obligation to Report Offenses. Persons in the Department of the Navy shall report to the proper authority offenses committed by persons in the Department of the Navy which come under their observation.³⁰⁶

Likewise, Military Assistance Command, Vietnam, Directive 20-4³⁰⁷ required that any allegation of a war crime be reported not only to the next higher headquarters but directly to MACV headquarters in Saigon, bypassing the regular chain of command and communication channels.

Violation of either of these orders constitutes a violation of Article 92 of the Uniform Code of Military Justice,³⁰⁸ either as a violation of a lawful general order or as an act which constitutes dereliction of duty. In the former charge, where there is a more substantial question of criminal intent, the maximum sentence is a dishonorable discharge (dismissal for officers) and confinement at hard labor for two years. In the latter case, where

³⁰³ Para. 156, MCM, 1969 (Rev. ed.).

³⁰⁴ 10 U. S. C. § 878.

³⁰⁵ Para. 157, MCM, 1969 (Rev. ed.).

³⁰⁶ United States Naval Regulations, 1973. These regulations apply to all members of the United States Navy and Marine Corps, active or reserve, and to Coast Guard units and personnel when attached to the Navy.

³⁰⁷ MACV Directive 20-4 (20 April 1965). This requirement was in effect throughout the period of major United States' involvement in Vietnam, being republished in all subsequent editions of MACV Directive 20-4 (25 March 1966; 10 July 1970; and 2 March 1971).

³⁰⁸ 10 U. S. C. § 892.

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commission of the offense may occur through an act of simple negligence, the maximum punishment is three months' confinement.³⁰⁹

Where there exists the necessary *mens rea*, something more than a mere failure or refusal to disclose an act and some positive act of concealment, the person so acting is guilty of misprision of a felony, a violation of Article 134,³¹⁰ for which the maximum punishment is a dishonorable discharge (dismissal for officers) and confinement at hard labor for three years. Any greater degree of intent would place the individual charged within the realm of the previously-discussed area of principal or accessory after the fact. Thus the degree of negligence is in direct relation to the degree of liability, and under either domestic law, charging one as a principal or accessory after the fact to murder, or international law, charging one in essence as a principal or accessory after the fact to a war crime, there exists a requirement that the negligence of the commander be so great as to be tantamount to the possession of the necessary *mens rea* to so become such an active party to the offense. Only upon a showing of this degree of negligence can there be imposed the maximum penalty of death. Thus in the *Pohl* trial, SS Standartenfuehrer (Colonel) Erwin Tschentscher was charged with war crimes committed by members of his battalion in the first Russian campaign from the first of July until December 31, 1941. The court noted that there was some evidence that he had constructive knowledge of the participation of members of his command, but no evidence that he had actual knowledge of such facts. Rejecting any strict liability theory although quoting *Yamashita*, the court did not believe the participation was of sufficient magnitude or duration to constitute notice to Colonel Tschentscher, and thus to give him an opportunity to control the actions of his subordinates.³¹¹ Had this been a court-martial, either of an individual normally subject to the Uniform Code of Military Justice or of a foreign officer being tried for war crimes pursuant to Article 18,³¹² the

³⁰⁹ A commissioned officer additionally may be punished by punitive separation from the service, i.e. dismissal, when convicted by a general court-martial of any offense in violation of the Uniform Code of Military Justice. Para. 126d, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, (REV. ED.).

³¹⁰ 10 U. S. C. § 934.

³¹¹ V TWC 1010-12. Colonel Tschentscher was found guilty of other charges and sentenced to ten years' imprisonment.

³¹² 10 U.S.C. 818. While a foreign officer would normally be charged with the commission of a war crime, Paragraph 12 Appendix 6a, Manual

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prosecution could have proceeded under multiplicitous charges and theories concerning the degree of negligence, absent actual knowledge and liability; as a minimum, given the Tribunal's judgment, Colonel Tschentscher would have been guilty of dereliction of duty. The standards of punishment parallel the standards of responsibility and proof under either domestic or international law; just as the Tribunal stated with regard to Colonel Tschentscher, proof of constructive knowledge under the Uniform Code of Military Justice does not constitute a showing of actual knowledge.³¹³

Where domestic law exists, however, charges against United States personnel should normally be drawn under that law rather than under the general "war crime" offense.³¹⁴ No nation is going to charge its own citizen with the commission of a war crime for obvious political reasons. There certainly exist psychological reasons why such charges would be drawn alleging specific offenses rather than the commission of a war crime — a result of the heinous connotation of those words and, as a result, perhaps a greater reluctance by a court to convict an accused. A parallel to the *Tschenstcher* case would serve to illustrate this point.

The accused was a company commander in Vietnam. His company occupied a night defensive position with another company. During the night one of several enemy prisoners taken during the action of the preceding day was shot and killed. Although the offense occurred within his perimeter and within sixty feet of his position, the accused did not investigate; he did, however, receive a report that one of the prisoners had grabbed a weapon

for Courts-Martial, United States, 1969 (Revised edition), states that there is no jurisdictional error in the erroneous designation of a specification as a violation of an article of the Uniform Code of Military Justice.

³¹³ United States v. Curtin, 9 USCMA 427, 26 CMR 207 (1958). There is no *per se* equation of the "should have known" test except through the previously-cited and discussed standards of negligence as applied to the individual case and its facts.

³¹⁴ Paragraph 507b of FM 27-10 states:

b. Persons Charged With War Crimes. The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law (see paras. 505 and 506).

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and shot the victim. He neither investigated the offense further nor did he report the offense in accordance with existing directives.³¹⁵ He was charged with and convicted of failure to obey a lawful general order and dereliction of duty, both offenses under Article 926.³¹⁶ While the evidence was sufficient to sustain a conviction under the charged domestic offenses,³¹⁷ it is arguable whether a conviction could have been obtained had the accused been charged with the commission of a war crime. As in *Tschentscher*, the appellate opinion declined to address the international *should have known* test, leaving to a commander some area in which he is permitted to exercise his personal judgment as to the necessity for further investigation; absent some serious personal dereliction manifesting some degree of *mens rea* the commander must be presumed to have acted in good faith, given all circumstances, unless the facts become so overbearing as to point an accusatory finger at him. These circumstances again require an examination and balancing of the subjective criteria previously discussed.

IV. SUMMARY

Out of the ashes of World War II there rose a desire to further define the responsibility of a commander for war crimes committed by his subordinates, a responsibility recognized by the earliest military scholars. Although the Tribunals after World War II sought to establish an international norm, there was of necessity much reliance on domestic standards in resolving questions of knowledge, responsibility, and negligence; and while the post-World War II trials from a legal point of view purportedly have no precedential value, the codification of many of the principals contained therein by the 1949 Geneva Convention would indicate that from a practical standpoint the standards formulated are recognized as international norms. All of the law of war is the formal expression of the principle of restraint; and it is to the commander, particularly the commander in the field, that the responsibility for exercise of restraint is most directed, inasmuch as he has control of both the means of destruction

³¹⁵ USARV Reg 335-6 (24 June 1967), which served as an implementing instruction for all United States Army Forces in Vietnam for the previously-cited MACV Directive 20-4.

³¹⁶ 10 U. S. C. § 892.

³¹⁷ *United States v. Golden*, 43 C.M.R. 710 (ACMR 1970).

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and the means of restraint. Throughout the history of warfare the commander has received the glories of victory and the burden of defeat, whether deserved or not.³¹⁸ The role of the commander is a lonely one; its authority may be delegated, but never its responsibility. In accepting the position of commander, an officer accepts massive responsibility — responsibility to see that his troops are fed, clothed, and paid; responsibility for their welfare, morale, and discipline; responsibility for his unit's tactical training and proficiency; responsibility for close coordination and cooperation with adjacent and supported or supporting units; and responsibility for accomplishment of his mission. He is no less charged with the responsibility to accomplish that mission within the limitations of the laws of war, and to exercise due control over his subordinates to insure their compliance.

In order to find a commander responsible, the acts charged must have been committed by troops under his command. Normally this refers to troops of his unit or of another unit over which he has both operational and administrative control; but absent either he may still be responsible if he otherwise had a duty and the means to control those troops and failed to do so. If he has executive authority over a specified occupied territory, he is responsible for all illegal acts occurring within that territory, or at least for controlling or preventing their occurrence. While exclusion of any one of these factors may excuse him from liability under international standards, he may nonetheless be held responsible under domestic standards if he knows of an offense and, possessed of the duty to respond, fails to do everything within his power to prevent or report that offense.

In controlling his men, the commander has a *duty* to utilize all means available to him to know of and prevent the occurrence of war crimes within his command. In particular, he cannot shun or ignore the obvious and plead ignorance as a defense in an effort to escape liability.

The commander who directly orders the commission of a war crimes shares the guilt of the perpetrator of the offense. So, too, does the intermediate commander who receives an order patently illegal on its face who passes that order to subordinates for

³¹⁸ General Joseph Joffre, who led the French Army in repulsing the German offensive at the battle of the Marne in 1914, was once asked who had won that battle—he or his subordinate commander, Ferdinand Foch. General Joffre replied that he did not know who had won the battle, “but if it had been lost I know who would have lost it.” A. VANDEGRIFT, *ONCE A MARINE* 9 (1964).

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execution, although the plea of superior orders may be heard in mitigation. A commander may also be held responsible where he does not necessarily order certain illegal acts but is shown to have encouraged their perpetration or incited his men to act. Where he has neither ordered nor incited his men to carry out war crimes, he may be deemed responsible if by his acts he has acquiesced therein. Only the degree of culpability may distinguish the commander from the actual perpetrators in the instances cited above.

Essential to any allegation of command responsibility is the element of knowledge, either *actual knowledge* or the *means of knowledge* which the commander failed to exercise. Actual knowledge may be presumed in two instances: (a) where the commander has executive authority over occupied territory, and the offenses occur within that territory; and (b) where reports of offenses are made to his command, the presumption being that such reports are made for the benefit of the commander. These presumptions may be rebutted, for example, by a showing of absence from the command at the time of the offense or its report, or by illness; but this rebuttal is temporary in nature, extending only for the period of the absence or illness. Any inaction upon resumption of command raises a presumption of acquiescence, knowledge again being presumed.

No theory of absolute liability has found acceptance in either international or domestic law. No man, whether commander or the lowest private, is held responsible for the acts of another absent the establishment of some sharing of the *mens rea*. The absolute liability theory has been expressly rejected in every case in which it was argued. Only where there has been wanton, immoral disregard amounting to acquiescence in the offense has criminal responsibility attached. The conduct — a wanton disregard of the occurrence of offenses — must be such as to support a finding that the commander is an accomplice in the sense that he shared the criminal intent of his subordinates and that he encouraged their misconduct through a failure to discover and intervene where he had a duty to prevent their action. Absent actual knowledge there must be either (1) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences; or (2) an imputation of constructive knowledge, that is, despite pleas to the contrary the commander under the facts and circumstances of the

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particular case must have known of the offenses charged and acquiesced therein.

In determining whether the commander either should have known or must have known of the occurrence of the offenses charged, certain subjective criteria may be considered in an effort to determine his means of knowledge: (a) the rank of the commander; (b) the experience of the commander; (c) the training of the men under his command; (d) the age and experience of the men under his command; (e) the size of the staff of the commander; (f) the comprehensiveness of the duties of the staff of the commander; (g) the "sliding probability ratio" of unit-incident-command; (h) the duties and complexities of the commander by virtue of the command he held; (i) communications abilities; (j) mobility of the commander; (k) isolation of the commander; (l) composition of forces within the command; and (m) the combat situation.

In holding a commander responsible under international standards, the commander's acts of commission or omission must be tantamount to "wanton, immoral disregard" of the acts of his subordinates. This international standard is consistent with municipal standards for which the same maximum penalty of death may be imposed. Where lesser penalties may be exacted, such as for a negligent failure to discover or report an offense, lesser standards of negligence — either culpable or simple — are provided. There municipal standards are defined by the Uniform Code of Military Justice and by duties imposed by existing orders and regulations; international standards are defined by existing treaties and conventions, in particular the 1949 Geneva Conventions which require wilful and wanton conduct in order for there to be a grave breach of those Conventions. Any further definition must depend on the facts of the particular case and the previously-discussed subjective criteria rather than a precisely-defined international definition. The duty is well established, the responsibility well-defined.

A contemporary Marine Corps recruiting poster asserts the principle:

Some men accept responsibility; others seek it.

Neither the principles of command nor the law of war can expect, nor accept, anything less.

COMMENTS

PROBLEMS OF CONSENT IN MEDICAL TREATMENT*

By Major Thomas A. Knapp**

*Every human being of adult years and sound mind has a right to determine what shall be done with his own body; . . .*¹

I. INTRODUCTION

Under normal circumstances a physician cannot legally undertake surgery or other medical procedures without first obtaining the consent of his patient. Moreover, a general or "blanket" consent is insufficient because the typical patient is ignorant of medical practice and will therefore be unaware of the collateral risks in most proposed therapies unless he is advised of them in advance by his physician. After such advice, the patient's decision to proceed with treatment, despite the risks disclosed to him, is the product of his *informed consent*.

Presented in this manner, informed consent is a deceptively simple proposition which nonetheless has fostered a great deal of confusion and generated much litigation. This article will briefly examine the history and background of the theory of informed consent and then address the more specific problems: the nature of consent with emphasis on the consent form, what constitutes an emergency, and the emergency doctrine as it applies to consent.

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¹ *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

Subsequently, the article will analyze the provisions for compulsory medical treatment of the adult as opposed to the qualified right of the adult to refuse medical care with emphasis on the military's position and the Constitutional implications of compulsory adult medical treatment.

A. HISTORY AND BACKGROUND OF CONSENT THEORY

The doctrine of informed consent originated in the dictum of a Virginia case. In *Hunter v. Burroughs*,² x-ray treatment had been used by the defendant physician in an attempt to cure the plaintiff's eczema. At the time, x-ray treatment was a new technique and the physician failed to warn the patient of the risks involved in its use. The patient suffered severe burns as a result of the treatment and sued his physician on two theories: (1) that the treatment had been administered in a negligent manner, and (2) that defendant had failed to fulfill his duty to warn his patient of the possible danger of adverse consequences. In affirming a judgment for the plaintiff, the appellate court found sufficient evidence to support the findings of negligent treatment and thus did not rule upon the issue of informed consent. However, in dictum the court analyzed this issue in terms which in later decisions became the theory of informed consent. The court affirmed the theory "... that it is the duty of a physician in the exercise of ordinary care to warn a patient of the danger of possible bad consequences of using a remedy. . . ." ³

The imposition of liability upon a physician for failing to disclose the possible consequences of a medical procedure is of relatively recent origin. The modern doctrine of informed consent originated in the 1950's in *Salgo v. Leland Stanford Junior University Board of Trustees*.⁴ Plaintiff Salgo suffered paralysis following an aortography performed at Stanford University Hospital. One issue on appeal was a jury instruction on the doctor's duty to disclose to his patient the risks of the aortography. The appellate court stated:

A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent.

² 123 Va. 113, 96 S.E. 360 (1918).

³ *Id.* at 133, 96 S.E. at 366.

⁴ 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

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... One [alternative] is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may very well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.⁵

Salgo was the first case to adopt this full disclosure model, but in so doing the court recognized the need for flexibility in tailoring disclosure to the specific patient's needs.

The *Salgo* opinion set the stage for the Kansas case of *Natanson v. Kline*.⁶ Irma Natanson, suffering from cancer of the breast, had undergone a radical left mastectomy. At the suggestion of the surgeon who performed that operation, she engaged a Dr. Kline for radiation therapy at the site of the mastectomy and the surrounding areas. After the operation, Mrs. Natanson exhibited sign of a severe injury to the skin cartilage and bone of her chest.

Mrs. Natanson alleged that Dr. Kline was negligent in two respects: (1) the administration of the therapy, and (2) his failure to warn Mrs. Natanson that the course of treatment involved great risk of bodily injury or death. The jury found that Dr. Kline did not commit any negligent acts that proximately caused the plaintiff's injury. On the second allegation, conflicting evidence tended to show that Mrs. Natanson fully understood the dangers and risks of the treatment, but Dr. Kline was unable to remember exactly what he had said to her. There was nothing to suggest that he had given her any warning, and Mrs. Natanson and her husband testified that Dr. Kline had not made any statements to them in the nature of a warning.

The trial court refused the plaintiff's request for an instruction on the issue of failing to warn the plaintiff. The appellate court held that the requested instruction was too broad. Nevertheless, in describing the procedure to be followed on retrial, the court said:

... the first issue for the jury to determine should be whether the administration of cobalt irradiation treatment was given with the informed consent of the patient, and if it was not, the physician who

⁵ *Id.* at 578, 317 P.2d at 181.

⁶ 186 Kan. 393, 350 P.2d 1093; *reh. denied*, 187 Kan. 186, 354 P.2d 670 (1960).

failed in his legal obligation is guilty of malpractice no matter how skillfully the treatment may have been administered, and the jury should determine the damages arising from the cobalt irradiation treatment. If the jury should find that informed consent was given by the patient for such treatment, the jury should next determine whether proper skill was used in administering the treatment.⁷

The court's opinion in *Natanson* seems to be based on a law review article by Professor Allen H. McCoid⁸ and on the three cases which it cited.⁹ One was an assault and battery case and the other two involved negligence. The court made the following statement:

The conclusion to be drawn from the foregoing cases is that where the physician or surgeon has affirmatively misrepresented the nature of the operation or has failed to point out the probable consequences of the course of treatment, he may be subjected to a claim of an unauthorized treatment.¹⁰

It is still not clear which theory the court was using because liability for *unauthorized treatment*, liability *in tort*, and liability for *malpractice* were all mentioned in the opinion.

In describing the nature of the disclosure required to avoid liability, the court used different expressions, suggesting the rule requires "substantial disclosure" at one point, "reasonable disclosure" at another, and "full disclosure" at yet another. The case was retried and upon a second appeal the Kansas Supreme Court clarified its intention to decide the case on a negligence theory.

Another case establishing the doctrine of informed consent as a distinct theory of medical liability is *Mitchell v. Robinson*.¹¹ This decision was handed down two days after the issuance of the second opinion in *Natanson*. In *Mitchell*, the plaintiff consented

⁷ *Id.* at 411, 350 P.2d at 1107.

⁸ Professor McCoid's thesis, very briefly summarized, is that the traditional assault and battery analysis, when applied to cases involving unauthorized medical treatment, is often awkward if not erroneous; the assault and battery approach should be confined to those relatively few cases in which the physician has engaged in intentional deviations from practice not intended to be beneficial to the patient; other cases should be tried and decided on other principles. McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381 (1957).

⁹ 186 Kan. at 404-05, 350 P.2d at 1102. The cited cases are *Lester v. Aetna Cas. & Sur. Co.*, 240 F.2d 676 (5th Cir. 1959) (alleged lack of explanation of hazards of electroshock treatment); *Bang v. Charles T. Miller Hosp.*, 251 Minn. 427, 88 N.W. 2d 186 (1958) (operation on prostate which required severance of spermatic cords); *Kenny v. Lockwood* (1932) 1 D.L.R. 507 (1931) (Canada) (failure to point out risks of hand surgery).

¹⁰ 186 Kan. at 406, 350 P.2d at 1103.

¹¹ 334 S.W. 2d 11 (Mo. 1960), *aff'd*, 360 S.W. 2d 673 (Mo. 1962).

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to combined electro-shock and insulin subcoma therapy; as in *Natanson*, the proposed procedure was new and radical. A recognized statistical hazard of the proposed procedure was the possibility of fractured vertebrae, an injury which plaintiff, in fact, sustained although no disclosure had been made to plaintiff at any time concerning this hazard. The plaintiff alleged that if he had known of the dangers of the procedure he would not have consented to it. The court held, as a matter of law, that a physician or surgeon owes his patients a general duty to disclose all possible collateral hazards.¹²

B. BATTERY VS. NEGLIGENCE CAUSES OF ACTION

Law suits have been tried both on the theory of battery¹³ and on the theory of negligence.¹⁴ The rules applicable to traditional assault and battery actions have been mixed with those of the standard malpractice law suit resulting in confusion among physicians and attorneys.¹⁵

The cases upon which the foundation of the doctrine of informed consent was based were cases of battery and invariably involved those instances where a physician performed an unauthorized operation.¹⁶ A battery consists of the unauthorized touching of another's person.¹⁷ Any treatment performed upon a patient to which he has not consented, or for which appropriate consent does not exist, is a battery, unless an emergency has prevented the physician from being able to obtain the requisite consent.¹⁸ A patient has a right to accept the proffered treatment or to take his chances without it.

¹² Whether this duty is met in a given case is a jury question and does not demand expert testimony. Mitchell has been overruled on this point by *Aiken v. Clary*, 396 S.W. 2d 668 (Mo. 1965). The current rule in Missouri is that the plaintiff must offer expert testimony to show what disclosures a reasonable medical practitioner would have made under the same or similar circumstances.

¹³ *Scott v. Wilson*, 396 S.W. 2d 532 (Tex. Civ. App. 1965). (Failure to warn of risk of possible total loss of hearing from stapedectomy).

¹⁴ *Aiken v. Clary*, 396 S.W. 2d 668 (Mo. 1965). (Alleged failure to warn of hazards of insulin shock therapy).

¹⁵ *McCoid, A Reappraisal of Liability for Unauthorized Medical Treatment* 41 MINN. L. REV. 381, 383-84 (1957).

¹⁶ *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905) (consent for operation on right ear—surgeon operated on more seriously infected left ear) is one of the landmark cases treating lack of informed consent as a battery.

¹⁷ PROSSER, HANDBOOK OF TORTS, §9 (4th ed. 1971).

¹⁸ *Smith, Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MOUNTAIN L. REV. 233 (1942).

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In a battery case, therefore, the dispositive issue is whether there was in fact legal consent for the medical procedures involved.¹⁹ Since in cases of consent some kind of authorization is usually present, the question is whether that authorization was intelligently given, thus being legally effective as an "informed consent".

The recent case of *Scott v. Wilson*²⁰ is the outstanding example of a case argued, and decided, on a theory of pure battery. In *Scott*, the defendant physician recommended that the plaintiff patient undergo an ear operation but failed to warn the patient of the danger of a total loss of hearing, a result known to occur in about one per cent of the cases involving this particular operation. The patient consented to the recommended operation and the operation was performed. The patient lost all hearing in his left ear and sued the physician on a theory of battery, alleging that the defendant's failure to warn him of the possibility of total deafness invalidated his consent. The court of civil appeals, reversing a directed verdict for the defendant, held that a physician is under a duty to inform his patients adequately of the dangers to be anticipated as a result of a certain procedure. A medical practice, undertaken without the patient's informed consent, renders the doctor pecuniarily liable in a suit for assault and battery.

There are several procedural matters to consider before deciding whether to base an informed consent action on battery or negligence. In an action based on a battery, the unpermitted, unconsented touching is sufficient to fix liability on the defendant. Therefore, battery as a course of action is the more elemental theory of liability and correspondingly easier to prove.

Unlike the malpractice action based on negligence, expert testimony need not be provided by the plaintiff in a battery action.²¹ In the battery action the only issue is whether the patient consented and not whether the doctor reasonably should have informed his patient of the risks involved.²² A patient may, there-

¹⁹ Even the fact that the unconsented treatment was beneficial or medically advisable does not excuse the patient or defendant physician. *McCoid, supra*, Note 8.

²⁰ 396 S.W. 2d 532 (Tex. Civ. App.—San Antonio 1965), *aff'd*, 412 S.W. 2d 229 (Tex. 1967).

²¹ LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES 224 (1960).

²² *Bang v. Charles T. Miller Hosp.*, 251 Minn. 427, 88 N.W. 2d 186 (1958).

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fore, rely entirely on nonexpert testimony in a battery action and the defendant physician is denied the use of expert testimony to establish that he complied with the professional standard of disclosure required under the circumstances. Since a battery is an intentional tort, punitive or exemplary damages are more likely to be awarded under an intentional battery theory rather than when proceeding under a negligence theory.²³

Section 2680 of the Federal Tort Claims Act excludes several familiar torts, including battery. *Moos v. United States*²⁴ appears to have rigidly applied this rule. In *Moos*, the claimant entered a VA hospital for an operation on his left leg and hip; instead, the surgeons, erroneously operated on his right leg and hip. The claim was held barred on the sound technical theory that the unconsented operation on the right leg and hip constituted an assault and battery and that this was the basis of the claim although it may have been accompanied or preceded by negligence. Lester S. Jayson²⁵ has suggested that today the Justice Department might be inclined to view such claims as based on negligent malpractice. When the *Moos* case was being litigated the Justice Department's principal defense was (1) that the claimant was a veteran, (2) that as a result of a wrongful operation he became eligible for additional compensation under the veterans' benefits laws and (3) that such compensation constituted the exclusive remedy against the United States. Consequently an action for assault and battery may not lie against the government in this type of case.

While certain courts have preferred to apply the battery concept in deciding the issue of informed consent, several jurisdictions have rejected this approach and have adopted a negligence theory as the basis for liability. They have reasoned that a more direct relationship exists between informed consent and negligence than between informed consent and battery.²⁶

In *Shetter v. Rochelle*²⁷ the court attempted to distinguish the theories of battery and negligence in informed consent cases. The court felt that in a battery action it is the operation that is the

²³ Evans, *Legal Consent: A Medical Dilemma*, 59 S. MED. J. 593 (1966).

²⁴ *Moos v. United States*, 225 F.2d 705 (8th Cir. 1955).

²⁵ 2 HANDLING FEDERAL TORT CLAIMS §260.01 (1964).

²⁶ *Nishi v. Hartwell*, 473 P.2d 116 (Hawaii 1970) (failure to disclose possible side effect of performing thoracic aortography); *Shetter v. Rochelle*, 409 P.2d 74 (Ariz. 1965) (failure to make full disclosure of risks inherent to cataract surgery).

²⁷ 409 P.2d 74 (Ariz. 1965).

wrong while in a malpractice action the wrong in not the operation but the failure to disclose. In *Bang v. Charles T. Miller Hospital*,²⁸ a patient consented to an operation for the removal of his prostate gland. He was not informed by the surgeon that his spermatic cords would be severed as part of the operation, although the patient did agree that the doctor might do whatever was necessary to cure the condition. Whether the patient consented to the severance of his spermatic cords was held to be a question for the jury.

A marked contrast can be seen between the facts in the *Bang*²⁹ case and the facts in the *Mitchell*³⁰ case. It is submitted that the difference is fundamental. In *Bang*, the patient thought he was going to be touched in a certain way (an operation on his prostate with possible surgery on the bladder) but was touched in a substantially different way (by severance of the spermatic cords). In *Mitchell*, the patient thought he was going to be touched in a certain way (insulin shock) and he was, in fact, touched in exactly that way; there was, however, a harmful result arising from a collateral risk the plaintiff had not been warned about (fractured vertebrae). *Bang*, therefore, involved a *battery* while the *Mitchell* decision was based on *medical negligence*.

II. NATURE OF CONSENT

Medical consent is an authorization by a patient that changes a touching that would otherwise be nonconsensual to one that is consensual and thus authorizes the doctor to act. It is crucial to know what constitutes consent and the best methods to provide proof of that consent.

There is no duty to disclose collateral risks that ought to be known by everyone³¹ or that are, in fact, known to the patient because of his prior experience with the proposed therapy.³² Under the "general knowledge doctrine" a patient is presumed to understand that operative procedures in medical treatment are not without certain hazards. A physician or surgeon is under no obligation to explain to an average patient those matters of which a reasonably well-informed patient should already be aware. Since

²⁸ 251 Minn. 427, 88 N.W. 2d 186 (1958).

²⁹ *Id.*

³⁰ See note 11. *supra*, and accompanying text.

³¹ *Roberts v. Young*, 119 N.W. 2d 627 (Mich. 1963); *Starnes v. Taylor*, 158 S.E. 2d 339 (N.C. 1968).

³² *Roberts v. Wood*, 206 F. Supp. 579 (S.D. Ala. 1962); *Yeates v. Harms*, 393 P.2d 982 (Kan. 1964).

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the average patient is aware of the general dangers inherent in any treatment, the physician's duty is essentially reduced to a disclosure of the dangers peculiar to the treatment imposed and of which the patient may be unaware.³³

A problem arising out of the general knowledge doctrine is that a physician who desires to adequately inform a patient whose knowledge is limited regarding the proposed treatment, and to avoid a possible law suit based on the contention that the patient's consent was invalid will clearly have to tailor his disclosure to the "general knowledge" of that particular patient.

A. STANDARDS OF INFORMATION DISCLOSURE

Authorization from the patient without a full understanding of that to which he is consenting is not an effective consent;³⁴ the patient must be provided with sufficient information to make his consent meaningful. There are two tests which have been used in recent cases to determine whether the physician furnished sufficient information to the patient.

The majority view, or "objective test," is whether the physician gave as much information concerning the contemplated procedure as is ordinarily given about that procedure by other physicians in the community. In *Govin v. Hunter*,³⁵ the patient contended that her surgeon should have advised her that multiple incisions would be necessary in a vein stripping procedure and, as a result, her leg would be scarred and disfigured. The court, recognizing that under certain circumstances a physician has a duty to reveal any serious risks involved in a contemplated procedure, stated that the manner in which a physician chooses to discharge this duty is primarily a matter of medical judgment. The court further stated that, in the absence of proof that the patient's physician departed from the practice of other competent physicians in furnishing information about the procedure to a patient, the verdict in the physician's favor would be upheld. In *Gray v. Grunagle*³⁶ the defendant surgeon testified on the standard medical practice in the community with respect to informing patients of the potential risks and hazards in surgical procedures involving the spinal cord, thereby establishing a standard against which

³³ See Morris, *Medical Malpractice: The Important Events of the Last Two Years*, 30 INS. COUNSEL JOURNAL 44 (1963).

³⁴ Russell v. Harwick, 166 So. 2d 904 (Fla. 1964).

³⁵ 374 P.2d 421 (Wyo. 1962).

³⁶ 423 Pa. 144, 223 A.2d 663 (1966).

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his disclosure to the patient could be measured. The appellate court affirmed a verdict in favor of the plaintiff because the evidence concerning disclosure permitted the jury to find that the patient had not been adequately informed of the risks of the procedure. The opposite result was reached in *Rea v. Gaulke*³⁷ where the defendant physician testified that the type of risk that materialized occurred so rarely that it was not the standard practice of physicians in the community to disclose it. Testimony by a physician as to the standard disclosure, and his adherence thereto, provides a basis for the jury to find in his favor. The objective test involves measuring a physician's disclosure to his patient against the standard for disclosure to patients adhered to by competent physicians in the locality.³⁸

The other test is "subjective." The physician can be held liable if the jury finds that the patient did not receive sufficient information to allow him to give an informed consent. Thus, if the patient has not been warned about a possible consequence of the procedure which in fact materialized, the jury may find that the failure to give this information may have induced an authorization from the patient which otherwise would not have been given.

In *Russell v. Harwick*³⁹ the patient asserted that, had she known of one of the results of the procedure used to repair a fractured hip, she would not have authorized the procedure and would have sought an orthopedic consultation. The patient had executed a consent form authorizing the physician to perform any operation he deemed advisable to repair her hip. Expert testimony at the trial indicated that, in electing to remove the head of the femur and to replace it with a metallic prosthesis, the physician had used the most satisfactory and successful method for treating such a fracture. The procedure was performed with due care and was successful by usual medical standards. However, the patient had not been apprised of the likely result that the leg would be shorter and the jury found the physician liable on a malpractice theory. On appeal the jury's verdict was affirmed on the grounds that (1) there was no emergency permitting a relaxation of the usual consent rules, and (2) a patient has a right to know the likely consequences involved in the contemplated treatment before deciding whether to give consent.

³⁷ 442 S.W. 2d 826 (Tex. Civ. App.—Houston 1969, writ ref'd n.r.e.).

³⁸ *Ditlow v. Kaplan*, 181 So.2d 226 (Fla. 1965).

³⁹ 166 So. 2d 904 (Fla. 1964).

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In a malpractice suit, it is not uncommon for the patient to allege that the physician failed to inform him of the nature or full hazards of the procedure. In those jurisdictions following the objective test if failure to inform is shown, the plaintiff must also show that the physician deviated from the conduct of other physicians in the area before liability for malpractice will be imposed.⁴⁰

However, the courts do not consistently follow this approach. Thus, in *Berkey v. Anderson*⁴¹ the court held that a physician has the same duty to disclose information as any other fiduciary and that the scope of disclosure necessary to meet the physician's duty was not limited to the standard of disclosure in the community as established by expert testimony.

A California court has subsequently determined that *Berkey* requires a patient to prove that the physician not only withheld information willfully and without good medical reason, but also that the patient would not have consented to the procedure had he been given such information.⁴² In jurisdictions that employ the subjective test, the patient need not introduce expert testimony on the standard of disclosure; he may prevail by establishing that the physician failed to inform him of the nature or full hazards of the procedure.⁴³ Even if the physician has provided the information ordinarily given by physicians in the community, he may be held liable. Strictly speaking, the finding should not be viewed as one of malpractice because an unauthorized procedure is a battery, an intentional tort.⁴⁴ Occasionally, courts employing the subjective test characterize the wrongful conduct as malpractice on the theory that any unauthorized medical procedure is a departure from good medical practice. In some situations comparable results may obtain regardless of the approach taken by the court. In considering a claim of insufficient

⁴⁰ *Aiken v. Clary*, 396 S.W. 2d 668 (Mo. 1965).

⁴¹ 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969); see also *Wilson v. Scott*, 412 S.W. 2d 299 (Tex. 1967), where the court affirmed the judgment of the court of civil appeals, which appeared to recognize a subjective standard, but indicated that the objective standard was appropriate.

⁴² *Dow v. Permanente Medical Group*, 12 Cal. App. 3d 488, 90 Cal. Rptr. 747 (1970).

⁴³ PROBLEMS IN HOSPITAL LAW, p. 23, Health Law Center, Pittsburgh, Pa. (1968).

⁴⁴ On occasion courts view the wrongful conduct as an intentional tort. See, for example, *Pearl v. Lesnick*, 19 N.Y. 2d 590, 278 N.Y.S. 2d 237, 224 N.E. 2d 739 (1967), where the court applied the statute of limitations for assault in an action brought by a woman who asserted she had consented only to a biopsy and not to the radical mastectomy which was performed.

disclosure as malpractice, the Oregon Supreme Court held that medical testimony was not necessary to establish an accepted standard of disclosure, stating that such testimony is required, however, to determine the materiality of the risk withheld, the feasibility of alternative treatment, and the effect of total disclosure on the patient.⁴⁵

A middle ground may be available. Since the materiality of a risk must be determined in the first instance by the physician, the issue should be approached from his point of view. Ideally, the rule would require that a risk be disclosed when the patient would attach importance to it, either alone or in combination with other risks, in making his decision whether or not to consent to treatment. Obviously, a physician cannot be required to be a mind reader and it would be unreasonable to expect him to know what the patient would or would not consider important. It is suggested that a risk is material when a reasonable person in what the physician knows or should know to be the patient's position, would attach significance to the risk or combination of risks in deciding whether to undergo proposed therapy.

Most courts have adopted the objective test for determining the sufficiency of the physician's disclosure to the patient. Several of these courts have specifically acknowledged that the characteristics of the particular patient must be taken into account, along with the procedure itself, in order to derive the standard for disclosure of physicians in the community.⁴⁶

These cases indicate that in some situations a physician may, as an exercise of his professional judgment, modify the information concerning the risks of an operation or the manner in which it is presented to the patient who is extremely distraught, even to the extent of omitting details that would ordinarily be disclosed to a less apprehensive patient. A number of courts that have accepted the objective test have recognized that a modified disclosure, tailored to the individual patient's characteristics, may be adequate as long as other physicians in the community would have made similar disclosure to such a patient, although the content of the disclosure differed from that ordinarily given patients about to undergo the same procedure.⁴⁷

⁴⁵ *Getchell v. Mansfield*, 489 P.2d 953 (Ore. 1971).

⁴⁶ It has also been suggested that there might even be circumstances where no disclosure at all would be proper due to the patient's condition. See *Nishi v. Hartwell*, 473 P.2d at 121 (Hawaii 1970).

⁴⁷ *Anderson v. Hooker*, 420 S.W.2d 235 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); see *Dunham v. Wright*, 302 F. Supp. 1108 (M.D. Pa. 1969).

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Some courts have stated that a physician is privileged to withhold information on specific risks when disclosure would be detrimental to his patient's well being. *Lester v. Aetna Casualty and Surety Company*⁴⁸ held there is a limited privilege to withhold information to "avoid frightening" the patient.⁴⁹ No result directed exception can be permitted to negate the general rule requiring the disclosure of all material risks. A physician may not withhold information whenever the existence of a risk might cause a patient to refuse a therapy which, in the physician's view, would be "good for him."⁵⁰ Such a paternalistic view would be unjustifiable and a patient is generally entitled to make a wrong decision. A possible exception is life preserving therapy discussed subsequently in this article. There is authority that indicates the physician can proceed with treatment when death is substantially certain and the proposed therapy has an extremely high probability of success even if the patient adamantly refuses to give his consent.⁵¹ This situation is rare and usually involves members of the Jehovah's Witnesses who refuse to authorize blood transfusions based on a literal reading of the Bible's prohibition against blood-drinking. The courts, often aided by legislative enactments, will order life preserving treatment when an infant, born or unborn, is involved or where there is an interest of the state to be served in ordering the lifesaving treatment.

These are cases in which a patient is irrationally apprehensive or where disclosure of a risk may be psychologically detrimental. In such cases, the physician's training and responsibility may permit him to establish the medical propriety of his decision not to disclose a collateral risk. The relevant question will be whether the physician acted in accordance with sound medical judgment when confronted by risk data that he could reasonably conclude

⁴⁸ 240 F.2d 676 (5th Cir. 1957).

⁴⁹ See *Roberts v. Wood*, 206 F. Supp. 579 (S.D. Ala. 1962) which held "The anxiety, apprehension and fear generated by a full disclosure may have a very detrimental effect on some patients." Also see *Salgo v. Leland Stanford Junior University Board of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957) and *Watson v. Clutts*, 136 S.E. 2d 617 (N.C. 1964).

⁵⁰ *Yeates v. Harms*, 393 P.2d 982 (Kan. 1964).

⁵¹ Application of President of Georgetown College, Inc., 331 F.2d 1000 (D. C. Cir.), cert. denied, 377 U.S. 987 (1964). (Blood transfusion authorized over protests of Jehovah's Witness, mother of 7-month-old child); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A. 2d 537 (N.J.), cert. denied, 377 U.S. 985 (1964). (Blood transfusion authorized during delivery for a pregnant Jehovah's Witness). See generally Comment, *Unauthorized Rendition of Life Saving Medical Treatment*, 53 CAL. L. REV. 860 (1965).

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would pose a substantial threat to the patient's well being if it were disclosed.

In *Fisher v. Wilmington General Hospital*⁵² the plaintiff was given a pint of blood in connection with a dilation and curettage and later developed jaundice hepatitis. She alleged that the defendant hospital was negligent in failing to warn her of the risk of contracting hepatitis. The court said:

Considering the frequency of the use of transfusions, the nature and extent of the risk involved in comparison with the alternative risk, the possible detrimental effect of advising patients of the risk and the general practice in the local medical profession not to so advise patients, the court feels impelled to conclude that this defendant did not have a legal duty to plaintiff to advise her in advance that hepatitis might be communicated thereby.⁵³

Consent of the patient is ordinarily required before treatment. When the patient is either physically unable or legally incompetent to consent and no emergency exists, consent must be obtained from a person who, because of his relationship to the patient, may be empowered to consent on his behalf. The authorization of a person giving consent for treatment of another must be based upon sufficient information to enable that person to formulate an intelligent opinion, and the physician must disclose risks involved in the procedure. In *Darrah v. Kite*⁵⁴ the court suggested that disclosure to a person whose consent on behalf of the patient is sought may have to be more extensive than to the patient himself. While a physician might have good reason not to disclose certain risks and consequences to the patient because of the adverse psychological effects, the same defense would not be available to the nondisclosing physician if the consent of another was relied upon.

B. EFFECT OF GENERAL OR BLANKET AUTHORIZATION

When a patient engages the services of a surgeon without any agreement as to what the surgeon is to do, the law generally authorizes the doctor to do what he considers necessary. When written or oral consent is obtained, the surgeon may not ordinarily deviate except in an emergency from the particular operation consented to by the patient. Written permission has the advantage

⁵² 149 A.2d 749 (Del. 1959).

⁵³ *Id.* at 753.

⁵⁴ 301 N.Y. Supp. 2d 286 (Sup. Ct. 1969).

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of naming the specific operation, and it may be drafted to provide for such other operations as the surgeon deems necessary.

Many physicians and hospitals have relied upon consent forms cast in language general enough to permit the physician to perform any medical or surgical procedure which he might believe to be in the best interest of the patient. This type of consent form is usually signed by the patient as a routine part of the admission procedure. Such a general consent is often unsatisfactory from the standpoint of protecting the physician or hospital from liability. In any event, there is no way of determining, without testimony, the nature of the treatment the patient believed would take place. The law makes no distinction between the patient who is taken to an operating room without having signed any authorization and the patient who has consented in writing to whatever surgery the physician deems advisable. In both situations testimony would be necessary to establish the extent of the patient's actual knowledge and understanding, for it is possible that the patient, after treatment, will claim he never knew the nature of the treatment before it was rendered. The written general consent form serves as evidence of the patient's voluntary submission to the treatment but in no way signifies that the patient understood the specific treatment that was undertaken.

No particular form is necessary to give validity to a written consent. For a written consent to be valid it should state the nature and extent of the operation authorized and it should be signed by a person legally qualified to give consent. The authorization should state who is to be responsible for administering the anesthetic and the post operative care if it is someone other than the attending physician or surgeon.⁵⁵ The inclusion of the place and date the form was signed and the signature of a witness is highly desirable. The more vague the terms of the consent, the more closely it will be viewed by the court.⁵⁶

General or "blanket" consent forms which purport to give the physician unlimited authority and discretion without specifying the particular operation are still in common use, not only in civilian hospitals but in military hospitals as well.⁵⁷

The defects of the general or blanket consent form are clearly illustrated by *Rogers v. Lumbermen's Mutual Casualty Com-*

⁵⁵ *Reed v. Laughlin*, 332 Mo. 424, 58 S.W. 2d 440 (1933).

⁵⁶ *Baldez v. Percy*, 35 Cal. App. 2d 485, 96 P.2d 142 (1939).

⁵⁷ See SF522, general consent form in use at military medical facilities.

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pany⁵⁸ in which it was alleged that while the patient had intended only to submit to a simple appendectomy, the physician removed not only her appendix but also her reproductive organs. Considerable evidence was offered to show that the patient was ignorant of any possibility that her reproductive organs would be removed. A general or blanket consent form was introduced to establish consent and the court held:

... the above so-called authorization is so ambiguous as to be almost completely worthless, and, certainly, since it fails to designate the nature of the operation authorized, and for which consent was given, it can have no possible weight under the factual circumstances of the instant case.⁵⁹

The consent forms presently in use in many civilian and military hospitals are inadequate because they are little more than the ambiguous form condemned as "almost completely worthless" in the *Rogers* case. *Rogers* stands for the proposition that general or blanket consent is no consent at all; when such a form is used, the physician and hospital must rely on the limits of oral or implied consent.

C. CONSENT REQUIREMENTS FOR A CIVILIAN AT A MILITARY MEDICAL FACILITY

Paragraph 5, Army Regulation 40-3⁶⁰ sets forth the consent requirements for a civilian who seeks treatment at a military medical facility. Before a civilian may be furnished care, the Regulation requires consent from the civilian or from someone authorized to consent on his behalf in accordance with applicable local laws. The Regulation briefly outlines implied and express consent,⁶¹ and gives examples of each. The Regulation specifies that the consent must be present "... even though an individual may be entitled by law to medical care in Army medical treatment facilities; ..."⁶²

D. CONSENT OF MINORS

To be legally sufficient, consent — whether implied or express — must be given by a person legally capable of giving such consent. Paragraph 5d(1), AR 40-3 provides that members of the

⁵⁸ 119 So. 2d 649 (Ct. App. La. 1960).

⁵⁹ *Id.* at 653.

⁶⁰ Army Reg. No. 40-3 (Change No. 26, 14 Feb. 1972) [hereinafter cited as AR 40-3].

⁶¹ AR 40-3, paras. 5b and 5c.

⁶² AR 40-3, para. 5d.

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uniformed services who are minors (under the age of 21) are considered "to be emancipated and therefore capable of consent as if they were adults."⁶³ The legal sufficiency of a consent by a nonmilitary minor to medical treatment is to be "determined by the statutory and judicial laws of the United States and the state in which the medical facility is located. . . ."⁶⁴ The discussion of consent of a minor concludes with a caveat to the medical treatment facility — "If there is a question as to the sufficiency of the minor's consent, the advice of a judge advocate or other legal officer should be sought."⁶⁵

When a medical or surgical procedure is to be performed upon a minor, the question arises — Is the minor's consent in and of itself legally sufficient? If not, from whom must consent be obtained? When faced with these questions, the courts have drawn upon the rules established in the area of commercial law. The general rule is that the consent of a minor to treatment is ineffective, and a physician must secure the consent of the minor's parent or someone standing in *loco parentis*.⁶⁶ Nevertheless, a number of courts have held that the consent of a minor was sufficient authorization for treatment. Decided on an ad hoc basis, these decisions were based upon certain determinative factors such as the minor's age, his maturity, the nature of surgery or treatment, the risks involved, the minor's marital status and emancipation, as well as certain public policy considerations.

While some courts imply a strict 21 years of age concept, there are frequently other factors present which may account for holding the minor's consent ineffective. In *Zaman v. Schultz*⁶⁷ the minor plaintiff, a domestic employee of defendant physician, had blood taken from her; there was no parental consent. There was conflicting evidence as to whether the plaintiff understood what was being done to her, but the evidence established the plaintiff did not resist. The judgment for the plaintiff was affirmed on the ground that her donation of blood was of no benefit to her and that the consent of her parents was required. In *Bonner v. Moran*,⁶⁸ a 15-year old child consented to be the donor in a skin grafting operation. The court held that the consent of the child

⁶³ AR 40-3, para. 5d(1).

⁶⁴ AR 40-3, para. 5d(2).

⁶⁵ *Id.*

⁶⁶ *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935); *Lacy v. Laird*, 166 Ohio St. 12, 139 N.E. 2d 25 (1956).

⁶⁷ 19 Pa. D. & C. 309 (1933).

⁶⁸ 126 F.2d 121 (D.C. Cir. 1941).

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was legally insufficient; parental consent was necessary. In addition to the child's lack of intelligence and maturity to understand the procedure which left him disfigured, the court emphasized that the operation was entirely for the benefit of another and was of no benefit to the child. In both the *Zaman* and *Bonner*, the principle ground for the decision was that the procedures in which the minors participated were of no benefit to them.

When children are of tender years,⁶⁹ the courts have applied a strict rule and permitted recovery when operations have been performed without parental consent. In these cases, there was little question that the minors were too young, nine and eleven, to be able to understand the nature and consequences of the contemplated operations. The courts referred to the age as the ground for finding no valid consent, thus the numerical age of the infant seemed to be a decisive factor. The language of these opinions indicates a different result might have been reached if the infants had been closer to majority or the medical operation had been for their benefit.

Several state courts have rejected the strict 21-year concept as the sole criterion for determining whether a minor possesses sufficient mental capacity to give intelligent consent. In *Gulf & Ship Island R.R. v. Sullivan*⁷⁰ the court held that a 17-year old boy had the capacity to consent to a smallpox vaccination, which the court described as "usually a very simple operation," and one that the boy had sufficient intelligence to understand. Similarly, in *Lacey v. Laird*⁷¹ it was decided that an 18-year old could effectively consent to simple plastic surgery to her nose. Still another court concluded that a 19-year old boy had the legal capacity to consent to a local anesthetic rather than the general anesthetic specified by his mother.⁷²

A recent case which typifies the factors a court will consider in resolving the issue of legal capacity of a minor to consent is *Younts v. St. Francis Hospital and School of Nursing, Inc.*⁷³ Nancy Younts, a 17-year old girl, suffered the loss of the end of her right ring finger when it was caught in a hospital door while she was visiting her mother. Her mother was recovering from an operation and was unconscious at the time. The girl's divorced

⁶⁹ *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935); *Moss v. Rishworth*, 222 S.W. 225 (Tex. Comm. App. 1920).

⁷⁰ 119 So. 501 (Miss. 1928).

⁷¹ *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E. 2d 25 (1956).

⁷² 237 Mich. 76, 211 N.W. 75 (Mich. 1926).

⁷³ 250 Kan. 292, 469 P.2d 330 (1970).

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father was 200 miles away, his address was unknown and no one else was available to give consent to medical treatment of the girl. The resident surgeon explained the contemplated procedure to the girl and consulted with the family physician. The daughter consented to the finger repair, both verbally and by submitting herself to treatment. The court, after reviewing the legal history of the doctrine of medical consent, distinguished *Bonner v. Moran*⁷⁴ by stressing "that one of the basic considerations to be taken into account is whether the proposed operation is for the benefit of the child and performed with a purpose of saving . . . life or limb."⁷⁵ Thus, the rules of law set forth in *Bonner* were correct but were inapplicable in the instant case. The court concluded that "the daughter was mature enough to understand the nature and consequences and to knowingly consent to the beneficial surgical procedure made necessary by the accident."⁷⁶

The courts have, for the most part, adopted the position that the effectiveness of a minor's consent should be determined by reference to his age, intellectual maturity, and understanding of the risks and benefits involved rather than an arbitrarily determined age standard. These decisions indicate that the courts have required parental consent when there was no emergency, the procedure was not for the minor's benefit, and the minor was of tender age, but have usually declined to consider parental consent necessary when the minor was over 15 years of age and the procedure was undertaken for his benefit.

When a contemplated procedure is to be performed upon an unemancipated minor below the age of 15 years, the consent of the minor alone will probably be considered ineffective; the consent of the parent or someone standing in *loco parentis* will be required. If the minor is over the age of 15, his consent alone may be sufficient if he is deemed mature enough to realize the dangers, as well as the expected benefits, of the contemplated procedure. No cases have been found that hold parental consent is required when a beneficial procedure is performed upon a minor over 15 years of age, but parental consent should be secured in order to avoid the issue of the minor's mental capacity.

Whether marriage or emancipation of a minor abrogates any requirement for parental consent depends to some extent on the rationale upon which consent is based. Almost half of the states

⁷⁴ 126 F.2d 121 (D. C. Cir. 1941).

⁷⁵ 205 Kan. 292, 301, 469 P.2d 330, 337 (1970).

⁷⁶ *Id.*

have enacted statutes providing that the consent of married and emancipated minors to medical and surgical procedures is valid.⁷⁷ Even in those states lacking a specific statutory provision validating the consent of a married minor, the author was unable to find any cases holding that parental consent was necessary in order to perform a medical procedure on a married minor. In some cases the courts have impliedly recognized the validity of a married minor's consent. In *Keister v. O'Neal*⁷⁸ the capacity of the patient to consent was not questioned although the only consents obtained were those of the 17-year-old patient and her 19-year-old husband. The *Keister* opinion would seem to indicate that the rule of parental consent for minors does not apply to married minors. In another case the patient was a married minor who had consented to treatment; the issue before the court was whether she had consented to the extension of the treatment. The court treated her legally capable of consenting to medical and surgical procedures as if she were an adult.⁷⁹

At least one court in a jurisdiction recognizing emancipation has held that whether the minor possesses the mental capacity necessary to consent to medical or surgical treatment is a question of fact to be determined by the jury. The factors deemed relevant to the determination of the issue are the patient's intelligence, maturity, training, economic independence, general adult conduct and freedom from control of parents,⁸⁰ and although a factor evidencing emancipation, the minor's marriage is not the single decisive factor.

Whenever a minor enters a hospital and is unmarried but economically separated from his parents, he *may* be emancipated; however, discretion suggests the consent of his parents be obtained whenever reasonably possible. When a minor's parents are unavailable, the facts that establish emancipation must be considered in two ways: (1) if the local jurisdiction recognizes emancipation the minor's consent will obviate the need for parental consent if he is, in fact, legally "emancipated"; (2) if the jurisdiction does not adhere to the strict 21-year-old concept of majority the facts that would prove emancipation would normally buttress the determination that the minor has sufficient maturity to understand the procedure and its results.

⁷⁷ See Appendix to this article.

⁷⁸ 59 Cal. App. 2d 428, 138 P.2d 723 (1943).

⁷⁹ *Rothe v. Hull*, 352 Mo. 926, 180 S.W. 2d 7 (1944).

⁸⁰ *Smith v. Seibly*, 72 Wash. 2d 16, 431 P.2d 719 (1967).

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With regard to these guidelines, the requirements of the military medical facilities should be considered. Frequently college age minors present themselves for treatment at a military medical facility while their parents are stationed overseas or otherwise are not immediately available. When this occurs the hospital or treatment facility should contact the Judge Advocate who renders legal services to that facility and obtain his opinion regarding the local law. The Judge Advocate should take into consideration both current regulations and the factors outlined in this paper in determining what is prohibited and what is allowed by the local state law.

Another factor which should be considered is the distinction between the treatment of simple ailments such as a cold or fever and the use of surgical procedures. It is submitted that wider latitude is allowed in treating a minor for a simple cold without parental consent than would be allowed for surgery. In analyzing the decisions in this field, it is questionable whether any but the most conservative states would require parental consent for the treatment of a minor over fifteen for a cold, a school examination, or the dispensing of aspirin, cough medicine or an antibiotic.

A married minor's consent to the treatment of his minor child would appear to be effective in those states where emancipation through marriage or military service is recognized or where the maturity of the minor parent is evident. The effectiveness of the consent of a minor parent has been recognized in several states by statutory provisions and in most instances, even without statutory authority, a hospital could accept the consent of the minor parent when he is mature enough to understand the nature and consequences of the contemplated procedure. Logically, a married minor who can consent for himself should be able to consent for his child since the married minor is legally responsible for the child's maintenance, support and supervision; there is no reason to hold him incapable of consenting to medical or surgical treatment of the child.

E. SPOUSAL CONSENT

In 1964 a hospital administrator in New York sought a court order permitting a surgical operation upon a comatose adult patient whose life was in jeopardy.⁸¹ The consent of the patient's

⁸¹ *Collins v. Davis*, 44 Misc. 2d 622, 254 N.Y.S. 2d 666 (1964).

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wife had been sought but she had refused to grant authorization for the procedure for personal, but medically unsound, reasons. The court noted that the physicians in the hospital were faced with choosing between performing an operation contrary to the wishes of the spouse or permitting the patient to die. The court distinguished this situation from that of a person who for religious or other reasons had refused to seek medical attention for himself or had forbidden a specific procedure. Here, the patient had sought medical attention and the hospital was seeking to provide it pursuant to sound medical judgment. The court authorized the surgical procedure for the patient. Another problem may arise if several relatives of the incompetent patient disagree as to the advisability of the treatment.

Obtaining the consent of a patient's spouse should be considered in two instances: first, where an elective procedure may affect the marital relationship, for example destroying reproductive capacity; and, second, where the patient is suffering some temporary or permanent incapacity and is unable to consent to the contemplated procedure. The need to inform the spouse and perhaps even to obtain the spouse's consent may exist where the contemplated procedure is elective and will result in terminating the reproductive capacity of the patient.⁸² If the patient is conscious, mentally capable of giving consent, and gives his consent, the consent of the spouse is usually not necessary.⁸³ Where the patient is unable to consent, the spouse is the logical person from whom to seek consent and such consent should be obtained.⁸⁴

III. CONSENT IN EMERGENCY SITUATIONS

When immediate treatment is required to preserve the life or health of the patient and it is impossible to obtain the consent of the patient or someone legally authorized to consent for him, the required procedure may be undertaken without any liability for failure to obtain consent. Such a situation is an emergency, and its existence vitiates the need for consent. When a condition is discovered during the course of an operation and an unforeseen procedure must be undertaken if the patient's life or health is to be preserved, the same rule will apply if the consent of the patient or someone authorized to consent for him is not obtainable.

⁸² HEALTH LAW CENTER, PROBLEMS IN HOSPITAL LAW 55 (1968).

⁸³ *Rosenberg v. Feigen*, 119 Cal. App. 2d 783, 260 P.2d 143 (1955).

⁸⁴ *Steele v. Woods*, 327 S.W. 2d 187 (Mo. 1959).

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This emergency exception has often been erroneously classified as implied consent. Implied consent arises when words or acts of the patient lead to the logical conclusion that the patient has consented to the procedure, although he has not specifically consented. On the other hand, the emergency doctrine comes into play when neither the patient nor anyone authorized by law to speak for him has explicitly or implicitly manifested consent. If the treatment is given in an emergency, the law grants to hospital personnel and the physician a privilege to undertake a non-consensual act to relieve the emergency conditions in the interest of preserving life.⁸⁵

When using the emergency doctrine as a defense to an action based on battery, it is necessary to establish that the patient's condition was of such nature that it justified acting without consent and initiation of treatment could not be delayed until consent was obtained.

When the physician has performed a procedure beyond the scope of the express consent his conduct might, in certain instances, be viewed as an extension of the procedure originally contemplated, thus impliedly consented to, or the physician's conduct might be considered in response to an emergency. In *Gravis v. Physicians and Surgeons Hospital*⁸⁶ the husband gave express consent to an exploratory operation on his wife but the surgeon went further and removed an abdominal obstruction. The court chose to characterize the procedure as one performed in an emergency and the surgeon was not held liable. The court could have exonerated the physician by viewing the procedure as an extension of the exploratory operation.

The concept of emergency in a consensual context involves the factual issues of time and the severity of the patient's condition. The existence of the facts indicating an emergency must be proved to establish the legal position of the hospital and the physician when allegations of lack of consent have been made.

Emergencies can arise due to the deterioration of a patient's condition while he is in a hospital. The estate of a woman hospitalized for a thyroidectomy brought suit alleging that her physician failed to obtain a special consent to conduct the operation

⁸⁵ *Kritzer v. Citron*, 101 Cal. App. 2d 224, 224 P.2d 808 (1950)—the distinction is between consent implied in fact and consent implied by virtue of the emergency.

⁸⁶ 415 S.W. 2d 674 (Tex. Civ. App. 1967), *rev'd on other grounds*, 427 S.W. 2d 310 (Tex. 1968).

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at a specified time despite the fact that she had signed general consent forms. The physician testified that the optimum time for surgery is when the pulse rate is low and the patient is not emotionally upset, and telling the patient of the time of the operation could influence either of these factors. The court held that a jury question was presented as to whether the physician was faced with an emergency situation under the facts of this case and therefore excused from obtaining consent.⁸⁷

A. THE EMERGENCY SITUATION

The physician may, without consent, proceed with medical treatment in emergency situations because inaction might cause the patient to suffer a greater injury and therefore would be contrary to good medical practice.

The following facts should exist before a medical practitioner avails himself of the emergency doctrine: (1) There must be a threat to the life or health of the patient; (2) The threat must be deemed to be an immediate one; (3) The hospital or physician must use every effort to document the medical need for proceeding without consent; and (4) No one authorized to consent can be contacted.

1. *Threat to Life or Health*

Unquestionably, a condition that constitutes an immediate threat to the life of a patient will justify treatment without first securing consent. In defining emergency, the courts speak in terms of a threat to life or health. Thus, an emergency exists when immediate action is necessary to prevent permanent bodily harm or death.

In *Tabor v. Scobee*,⁸⁸ the plaintiff sought damages for the unauthorized removal of her fallopian tubes. During an operation the defendant-physician discovered that the patient's fallopian tubes were infected, swollen and sealed at both ends. The patient was under anesthesia and the consent of her stepmother who was in the hospital was not sought. The defendant removed the fallopian tubes on the theory that they would have had to be removed within six months. The jury found the defendant-physician not liable but the appellate court reversed. The court suggested that the following instruction be given at the retrial:

⁸⁷ *Dunham v. Wright*, 302 F. Supp. 1108 (M.D. Pa. 1969), *aff'd*, 423 F.2d 940 (3rd Cir. 1970).

⁸⁸ 254 S.W. 2d 474 (Ky. 1952).

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[The defendant will not be excused from acquiring proper consent] . . . unless you believe from the evidence that their (fallopian tubes) condition was such as that it would have endangered her life or health to have let them stay in, either because they might immediately have ruptured or because a separate or later operation for their removal might unduly have endangered her life or her health and it was impractical at the time for Dr. Scobee to obtain the consent of either Maxine Tabor or her stepmother, Mrs. Tabor, before removal of the tubes.⁸⁹

In several cases in which the emergency doctrine was applied, the courts have expanded the application of the emergency doctrine to situations where the treatment is immediately required to alleviate great pain and suffering although the threat of irreversible harm is not present.⁹⁰ The emergency doctrine has also been extended to encompass those situations caused by the action of the surgeon himself. When a piece of surgical equipment was left inside the body of the patient by a surgeon, the courts have held an operation to remove it does not require consent if allowing it to remain would be dangerous to the patient's life or health.⁹¹

2. *Immediacy of the Threat*

The threat to life or health must be immediate in order to constitute an emergency.⁹² Thus, if a delay would increase the hazard, treatment without consent is allowed. In cases where delay would not materially increase the hazard, although treatment may be medically advisable at that time or in the future, nonconsensual treatment cannot be excused by contending that an emergency existed.

In *Chambers v. Nottebaum*⁹³ the administration of a spinal anesthetic to a patient about to undergo an appendectomy was held actionable despite the physician's claim of an emergency. There was no acute attack of appendicitis and the doctor's discovery of the patient's inability to take a general anesthetic could

⁸⁹ *Id.* at 477.

⁹⁰ *Wells v. McGehee*, 39 So. 2d 196 (La. Ct. App. 1949). Child under anesthesia in order to set broken arm. *Sullivan v. Montgomery*, 155 Misc. 448, 449, 279 N.Y.S. 575, 577 (1935) (" . . . if a physician is confronted with an emergency which endangers the life or health of the patient, or that suffering or pain may be alleviated, it is his duty to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the same locality.").

⁹¹ *Preston v. Hubbell*, 87 Cal. App. 2d 53, 196 P.2d 113 (1948); *Delahunt v. Finton*, 244 Mich. 226, 221 N.W. 168 (1928); *Higley v. Jeffrey*, 44 Wyo. 37, 8 P.2d 96 (1932).

⁹² *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912).

⁹³ 96 So. 2d 716 (1957).

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have been communicated to the patient for the purpose of obtaining his consent to use another type of anesthetic. Consistent with this case is *Zoski v. Gaines*,⁹⁴ a Michigan case involving the removal of the infected tonsils of a minor child without parental consent. The court held that only in very extreme cases does a surgeon have the right to operate without consent and that there was no immediate necessity for removal of the tonsils before the parents could be consulted.

3. Proof of Emergency

In order to prove that the emergency constituted an immediate threat to the life or health of the patient, the hospital should require, and the physician should seek, consultation before the procedure is commenced. The consultation should be documented in the patient's records. Hospitals and physicians must use every effort to document the medical need for proceeding with treatment without consent. These notations should clearly indicate the nature of the threat to life or health, its immediacy, and its magnitude.

The importance of consultation and its documentation is exemplified by the case of *Luka v. Lowrie*⁹⁵ where the foot of a 15-year-old boy was run over and crushed by a train. Upon arrival at the hospital the defendant-physician, after extensive consultation with four other physicians, decided that it was necessary to amputate the foot. The court said that it would be inconceivable that had the parents been present they would have refused consent in the face of a determination by five physicians that amputation was necessary to save the boy's life. Thus, in spite of testimony at the trial that there had been a possibility of saving the boy's foot, professional consultation prior to the amputation supported the assertion that a bona fide emergency existed — no consent was needed.

In juxtaposition is *Rogers v. Sells*⁹⁶ where the physician amputated the foot of a 14-year-old boy, his only consultation being with two nurses and a bacteriologist. The appellate court upheld a verdict for the plaintiff stating that if emergency is raised as a defense, the physician has the burden of proving its existence, thus negating the requirement for consent. If the defendant had been able to show consultation with other surgeons as was the

⁹⁴ 260 N.W. 99 (1935).

⁹⁵ 136 N.W. 1106 (1912).

⁹⁶ 178 Okla. 103, 61 P.2d 1018 (1936).

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physician in *Luka*, it is doubtful that the plaintiff would have prevailed.

4. Unavailability of Someone to Consent

Lastly, the hospital or physician should be prepared to show that under the circumstances it was impossible to obtain the consent of the patient or someone legally authorized to consent for him without a delay that might increase the hazard to the patient. A physician is permitted, in an emergency, to operate on an unconscious individual who is unable to make his own decisions.⁹⁷ This situation frequently arises when a serious accident has taken place and the patient is unable to act for himself and next-of-kin is unavailable.

Before relying upon the existence of an emergency, it is necessary to make a reasonable effort, based upon the time available and the degree of risk associated with the proposed treatment, to obtain the consent of the patient or someone qualified to consent for him. If no consent can be obtained after a reasonable attempt has been made, the medical procedure may be undertaken.

To hold that a surgeon must wait until perhaps he may be able to secure consent of the parents before giving to the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved.⁹⁸

Several states have provided by statute for consent to be given on behalf of a minor by anyone in *loco parentis* to the minor when an emergency exists and the parents cannot be located.⁹⁹ These statutes do not provide for the authorization of a procedure in the event that someone in *loco parentis* is also unavailable. However, it is submitted that the usual rules permitting emergency treatment could be relied upon if no consent is obtainable.

IV. THE MANNER IN WHICH CONSENT MAY BE INDICATED

The emergency situations just discussed, certain public health considerations, and current Army Regulations support nonconsensual medical treatment in a limited number of cases. However, the vast majority of instances of treatment fall within the general rule that the patient's consent is a prerequisite to any

⁹⁷ *Franklyn v. Peabody*, 249 Mich. 363, 228 N.W. 681 (1930).

⁹⁸ *Luka v. Lowrie*, 171 Mich. 122, 127, 136 N.W. 1106, 1110 (1912).

⁹⁹ ARIZONA REV. STAT. ANN. § 44-132 (SUPP. 1965); N. M. STAT. ANN. § 12-12-1 (SUPP. 1965).

medical procedure. That consent may be express or implied. Express consent may be given orally or in writing.

A. EXPRESS CONSENT

When a physician tells a competent adult patient that an operation is necessary and the patient agrees to that operation, legal consent to that procedure has been obtained. When consent has been obtained and the procedure performed, it is conceivable that the patient will later assert that he did not consent. Resolution of this issue in the physician's favor depends on whether consent of the patient can be proven. Consent may be proved by testimony asserting the oral assent of the patient or by the introduction of a statement signed by the patient evidencing his expressed consent to the particular course of treatment. The signed statement is, of course, most effective because it places the burden upon the patient, who is making the claim, to explain why his written assent does not constitute his legal consent.

B. IMPLIED CONSENT

Voluntary submission to medical treatment constitutes an implied consent to the procedure even though there is no express verbal or written consent. If an individual observes a line of people and notices that injections are being administered to the people at the head of the line he should expect to receive an injection if he joins the line and reaches its head. Therefore, the voluntary act of entering the line after seeing what was taking place at its head and proceeding to the head of the line are accepted as manifestations of consent to the injection.

A voluntary submission to a medical procedure may constitute implied consent where the limits of the procedure are clearly apparent. The physician may rely on the actions of the patient in concluding that the patient has authorized the procedure. However, the scope of the consent implied from a voluntary submission to treatment is limited to the particular treatment contemplated by the parties and by the knowledge of the patient prior to submission. Only if the patient is aware or as a reasonable person should be aware of what his actions mean in their context can the act be found to imply consent to the procedure.

For instance, the fact that a patient understands that an anesthesia is being administered and submits to it may not be

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sufficient to constitute an implied authorization for all the procedures that the physician may thereafter perform. In order for consent to be implied, it must be shown that the patient knew of the medical procedure to be performed and the possible consequences of this procedure before the anesthesia is administered. Otherwise, it may be found that the patient's submission was effective consent to the anesthesia but that the subsequent medical procedures were nonconsensual touchings. The obvious danger in relying upon voluntary submission as evidence of consent is that a jury may disbelieve the testimony of the physician regarding the circumstances surrounding the patient's submission.

An adult patient of sound mind who (1) knows that he can either agree or refuse to submit to an operation, or (2) knows or has been fully and fairly informed by his physicians as to what is to be done, and (3) then cooperates with the physicians, has impliedly consented to the medical procedure.¹⁰⁰ Implied consent to operations, however, involves a possible misunderstanding by the patient of the purpose and scope of the undertaking.

Oral consent to an operation is ordinarily supplemented by implied consent, the patient orally consenting to the operation and then cooperating with the physician in its performance. Like implied consent, oral consent is subject to being misunderstood and may be difficult to prove.

C. IMPOSED CONSENT

Instances of consent imposed by state statutory provision are found in the compulsory inoculations for school children¹⁰¹ and the mandatory sterilization of mental defectives¹⁰² and criminals.¹⁰³

The Army position on imposed consent in medical treatment is forcefully and clearly stated in Army Regulation 600-20.¹⁰⁴ This Regulation provides that medical care may be performed with or without the member's permission in cases of "[e]mergency medical care which is required to preserve the life or health of the

¹⁰⁰ *Knowles v. Blue*, 209 Ala. 27, 95 So. 481 (1923)—(Skin graft probably to be taken from his arm—instead was taken from his leg. Court held consent implied inasmuch as the patient voluntarily agreed without knowing exactly from which part of his body the skin would be taken.).

¹⁰¹ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

¹⁰² *Buck v. Bell*, 274 U.S. 200 (1924).

¹⁰³ *People v. Blankenship*, 16 Cal. App. 2d 606, 61 P.2d 352 (1936).

¹⁰⁴ Army Reg. No. 600-20 (28 April 1971) [hereinafter cited as AR 600-20].

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member"¹⁰⁵ and "[i]mmunization required by AR 40-562 or other Department of Army directives."¹⁰⁶

In enunciating the policies to be followed, the Regulation states that the purpose of the policies is to protect the health and overall effectiveness of the command as well as the health of the individual soldier. Under this Regulation immunizations are regarded as a *military obligation* and the individual does not have an option of deciding whether or not he will be immunized. The Regulation directs that:

. . . Any force necessary to overcome an individual's reluctance to immunization normally will be provided by personnel acting under orders from the soldier's unit commander. The commonly used expression "refusal to take shots" erroneously suggests that the individual concerned has an option between being immunized or being punished for his refusal. This is incorrect. . . .¹⁰⁷

Unless contradicted for medical or bona fide religious reasons (para. 9, AR 40-562), any required immunization will be administered to a member with or without his consent. Every reasonable effort should be made to avoid the necessity of disciplinary action. However, a member should be advised that he may subject himself to disciplinary action by resisting, and that he will be inoculated with or without his consent in any event.¹⁰⁸

This Regulation leaves little doubt that the Army contemplates that immunizations will, if necessary, be forcefully administered. Although this procedure may seem extreme, it is noteworthy that the United States Supreme Court has upheld compulsory vaccination of school children, stating: "The principle is too well established to require citation that the so-called constitutional liberties are not absolute, but are relative only."¹⁰⁹

The Court cited with approval the case of *Jacobson v. Massachusetts*¹¹⁰ which sustained the Massachusetts compulsory vaccination act against the claim that it interfered with personal liberties. There is little reason to feel that the Supreme Court would take a different position regarding forced inoculations of soldiers.

Army Regulation 600-20 also provides for submission to medical care that is considered necessary to protect or maintain the health of others, to preserve the member's life or to alleviate undue suffering by the member. Such cases often involve isolation

¹⁰⁵ AR 600-20, para. 5-34a (Change No. 2, 23 Mar. 1973).

¹⁰⁶ AR 600-20, para. 5-34b (Change No. 2, 23 Mar. 1973).

¹⁰⁷ *Id.* para. 5-34b (4).

¹⁰⁸ AR 600-20, para. 5-34b (5).

¹⁰⁹ *Sadlock v. Board of Education*, 137 N.J.L. 85, 91, 58 A.2d 218, 222 (1948).

¹¹⁰ 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (3 Ann. Cas. 765).

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and quarantine for suspected or proven communicable disease. Detention on closed wards may also be necessary to insure appropriate medical supervision or to protect the serviceman or others from harmful acts. Other medical care as relating to the mental disorders of service members who have been found incompetent by a medical board or who are believed to be incompetent and for whom medical board action is pending is also included.¹¹¹

V. REFUSAL TO SUBMIT TO MEDICAL CARE

A. COMPULSORY MEDICAL TREATMENT IN THE MILITARY

The Army requires that those who refuse medical treatment in instances other than those previously described in this paper are to be processed under provisions of Paragraph 5-35, Army Regulation 600-20.¹¹² The Regulation requires the convening of a medical board before action under the Uniform Code of Military Justice may be taken when the individual or his guardian objects to the recommended medical care. The general principles to be followed by the medical board are set forth in Paragraph 5-35, AR 600-20. If the member's refusal is based on religious beliefs, the Regulation provides that a chaplain will be appointed as a member of the board. The medical board is required to obtain and report answers to the following questions:

- 1) Is the proposed treatment required to relieve the incapacity and restore the individual to a duty status, and may it be expected to do so?
- 2) Is the proposed treatment an established procedure that qualified and experienced physicians ordinarily would recommend and undertake?
- 3) Considering the risks ordinarily associated with the proposed treatment, the member's age, and general physical condition, and his reasons for refusing treatment, is the refusal reasonable or unreasonable or in the case of an incompetent member, is compulsory treatment warranted?¹¹³

In determining whether or not the refusal to submit to medical treatment was reasonable, the board is admonished to consider physical or mental contraindications, previous unsuccessful operations or procedures and any other special risks that are present under the particular circumstances. The report of the board must

¹¹¹ Also see Levin, *Consent to Medical Procedures*, 1963 INS. L. J. 711.

¹¹² See notes 109-111, *supra*, and accompanying text.

¹¹³ AR 600-20, para. 5-35a.

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show that the member was given the opportunity to appear in person, if his condition permitted, or that he was afforded an opportunity to submit a written statement explaining the grounds for his refusal.¹¹⁴ If the medical board finds that the proposed medical care is necessary for the protection of the service member's health or the health of others or is required for the member to properly perform his duties, such finding after being approved, will be made known to the member and he will be afforded the opportunity to accept the prescribed care.¹¹⁵ If the member still persists in his refusal, the medical treatment facility commander will forward the medical board proceedings to The Surgeon General of the Army for review.¹¹⁶ The Surgeon General will indicate his approval or disapproval of the medical board proceedings and return them to the medical treatment facility commander.¹¹⁷ If the Surgeon General approves the medical board proceedings, the member will again be afforded the opportunity to accept treatment. If the member continues to persist in his refusal to accept the offered medical care, the medical treatment facility commander will refer the matter to the appropriate CONUS Army or major overseas commander who shall determine whether the member will be ordered to submit to the recommended medical care. If the appropriate commander orders the member to submit to treatment and the member refuses to obey, the servicemember is then subject to disciplinary action under the Uniform Code of Military Justice,¹¹⁸ or the commander may institute administrative action to separate the member from the service.

The author was unable to find any reported court-martial case dealing with such an offense since the adoption of the Uniform Code of Military Justice. Nevertheless, The Judge Advocate General of the Army has traditionally taken a position that sanctions the use of force when a serviceman refuses recommended surgery. The opinions on the subject, however, seem to have been purposely qualified.¹¹⁹

¹¹⁴ *Id.* para. 5-35f.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 10 U.S.C. §892 (1956). See also Appendix 6C(29)—MANUAL FOR COURTS-MARTIAL, 1969 (Rev. ed.).

¹¹⁹ See JAGA 1951/2300 (March 16, 1951); JAGA 1951/4171 (July 10, 1951); JAGA 1955/8356 (October 24, 1955). See SCHILLER, MILITARY LAW 94 (1952) for a 1918 opinion.

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In a 1918 opinion on whether a soldier could be forced to submit to a hernia repair, The Judge Advocate General commented that: "... the Government has the right to take any measures short, at least, of those which involve danger to life, which may be necessary to restore the man to proper physical condition."¹²⁰ In effect, the opinion would require submission to any operation that the medical department would certify was not dangerous to life. The opinion was a qualified one applying only during time of war when the need for manpower is great.

A subsequent opinion by The Judge Advocate General¹²¹ in response to a question whether registrants with remedial defects may be required to undergo surgery and what action could be taken if they refused, followed the 1918 opinion. The latter opinion stated that the individual could lawfully be ordered to submit to surgery provided: (1) That such correction is necessary to enable them to properly perform their military duty, and (2) That the contemplated surgery will normally result in such effect. If the individual refused "it is believed that in time of war or other national emergency requiring the fullest utilization of manpower" the member may be compelled, forcibly and without his consent, to submit to surgery even though he could also be subjected to trial by court-martial for his refusal to obey the order. This opinion was qualified by saying "... the matter is not entirely free from doubt" again referring to wartime or "other national emergencies."¹²²

The same position is taken later in a 1951 letter to Representative John Byrnes with the proviso that no comment was made with respect to Army Policy "in the case of those persons in the service who refuse to submit to surgery upon religious grounds" as it was not "a matter within the purview of this office."¹²³ Another opinion reaffirms the authority of the President to insure the efficiency and effectiveness of the Armed Forces stating that it is the position of the Department of Army based upon "... precedent of longstanding that compulsory medical treatment, consistent with AR 600-10 does not invade the Constitutional rights of the individual treated."¹²⁴

¹²⁰ Opinion of The Judge Advocate General, Mar. 5, 1918, 1918 Op. JAG 152.

¹²¹ JAGA 1951/2300 (March 16, 1951).

¹²² *Id.*

¹²³ JAGA 1951/4171 (July 10, 1951).

¹²⁴ JAGA 1955/8356 (October 24, 1955).

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The following hypothetical fact situations have been developed in order to point out the practical problems of forced medical treatment.

Joe Smith, age 20, was a quiet boy never having been particularly active in sports or other strenuous activities. At an early age Joe had rheumatic fever; however, he was unaware of this fact and has never suffered any symptomatology. Consequently, upon Joe's entry into the Army, this fact was not known to the examining authorities. During basic training Joe lived in a barracks with twenty other soldiers and was exposed to streptococcal organisms. Joe developed an infection and the infection caused by these organisms, coupled with the strenuous routine of basic training, resulted several months later in symptoms of dyspnea (shortness of breath) and orthopnea (shortness of breath when lying flat on one's back). Joe was subsequently taken to an Army medical treatment facility where examination disclosed that the combination of streptococcal organisms and the rigorous training routine had resulted in insult to the heart and subsequent damage to the hearth valves. The treating physician recommended open heart surgery to repair the valvular damage. If this surgical procedure was not followed the medical opinion was that Joe could be expected to develop increasing disability which would preclude him from functioning in any position in the military and Joe's life expectancy would be predictably shortened with the possibility of sudden unexpected death at any time. If the repair was performed, it was the doctor's opinion that Joe might be able to function in some military jobs that require little strenuous activity and Joe's life expectancy would be markedly improved. The risk of mortality during surgery involving this surgical procedure was approximately three to ten per cent, adjusted to age, health, and the existing condition of the heart. Joe refused to submit to the medical treatment, indicating he did not wish open heart surgery; he was afraid of the anesthetic and that he wished to take his chances on his life expectancy. Joe's mental condition would be quite poor if surgery were ordered.

It seems inconceivable that a medical board, The Surgeon General of the Army, or any CONUS Army or major overseas commander would order submission under these circumstances, even though the risk of mortality was comparatively low and to a reasonable man it would seem to be to Joe's advantage to accept the surgery. This type of situation is relatively rare but it

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serves to illustrate a case more difficult than one involving an immunization.

The more common situation is illustrated by the following hypothetical. Johnny Jones, also age 20, developed a right inguinal hernia while running the infiltration course in basic training. Johnny was taken to the medical treatment facility where examination disclosed that the hernia would disqualify Johnny from most military duties, although in civilian life this hernia would not require repair (although it would be highly desirable). Johnny's life expectancy would not be affected by the unrepaired hernia unless an unforeseen complication such as strangulation of the hernia, should occur. With repair Johnny would be restored to full health, would be able to perform all military duties, and would have no disability. Either a general or a spinal anesthesia would be used during surgery and the risk of unforeseen complications occurring during surgery would be minimal but present. The chance of mortality is probably less than one per cent. Some of the complications which could develop are: (1) Idiosyncratic reaction to the anesthetic agent (an unexplained and unexpected reaction); (2) Development of infection; (3) Unsuccessful repair with a development of a larger hernia later; and (4) Anestheologic complications. Johnny indicated that, in view of the need for either a general or a spinal anesthesiology, he did not wish to submit to the recommended procedure.

Under these facts, it is probable that the physician, the medical board, The Surgeon General of the Army, and the CONUS Army or major overseas commander would determine that Johnny should be ordered to submit to the recommended medical care. Looking at the questions the medical board must answer, it is conceded that a hernia repair is a relatively simple procedure which would relieve the incapacity and restore the individual to a duty status; hernia repair is an established medical procedure that physicians recommend and undertake. Thus, the only question the board must answer is whether the refusal to submit to treatment is reasonable or unreasonable considering the nature of the treatment, the member's age and general physical condition.

In a similar factual situation, The Judge Advocate General of the Army has advanced the opinion that the military authorities may undertake those measures necessary to restore a man to proper physical condition as long as his life is not endangered.¹²⁵

¹²⁵ SCHILLER, MILITARY LAW 94 (1952).

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The only qualifying requirement would be that the procedure "was without danger to life."¹²⁶ This is merely a resolution of the question of whether the refusal is reasonable or unreasonable — is the member's life endangered?

In the second fact situation, the chance of mortality is substantially less than one per cent and hernia repair is a medical procedure that has been recognized for more than fifty years. Although the possibility of complication does exist this possibility would not deter the "reasonable" individual. Since, in the minds of most individuals, a hernia repair is a routine and simple procedure, a refusal to submit to the procedure would probably be classified as unreasonable. If Johnny continued to refuse medical care after final ruling by the commander that the treatment should take place, he could be charged under Article 92 of the Uniform Code of Military Justice for "failure to obey a lawful order to submit to certain medical treatment."¹²⁷

The question may be posed: Is compulsory treatment under these facts warranted? Most writers take the unqualified position that force is always authorized when a serviceman refuses recommended surgery. One author has stated:

Does a person in the military service possess . . . "the right to the inviolability of his person, the right to himself?" Can he be operated upon without his consent?

To reach a logical as well as a legal answer to these questions, the basic duty of military personnel must be borne in mind. Every soldier, sailor, airman and marine has a duty to maintain himself in the best possible physical condition to perform the military tasks that are required of him, whether in the preparation for the defense, or in the actual defense of the United States. Diagnosis and correcting medical treatment play an important part in maintaining military manpower at the proper efficient level. If a serviceman were permitted to decide for himself that he would not have a needed operation and thereby make himself unavailable for military duty, the availability of the armed services to maintain military strength at peak efficiency would be seriously impaired. Thus, in the case of military personnel, the rule is that consent is not necessary in order to perform an operation.¹²⁸

This same author defined an "operation" as follows:

In surgical practice, the term is of indefinite importance, but may be approximately defined as an act or succession of acts performed upon the body of a patient, for his relief or restoration to normal conditions, either by manipulation or the use of surgical instruments

¹²⁶ *Id.* at 95.

¹²⁷ 10 U.S.C. §892 (1956). See MCM 1969 (Rev. ed.), Appendix 6c (29) for model specification form.

¹²⁸ Marchus, *Medical Malpractice, Hospital Negligence and the Armed Services* at 68-69 (May 1957) (unpublished thesis presented to The Judge Advocate General's School, United States Army).

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or both, as distinguished from therapeutic treatment by the administration of drugs or other remedial agencies.¹²⁹

Another writer, in summing up the exceptions to the general rule that consent must precede surgical treatment, has stated:

Another exception is founded on military expediency. Every officer and airman has a duty to maintain himself in the best possible physical condition to perform his military duties. Thus in the case of military personnel, consent of the patient is unnecessary in order for a military medical surgeon to perform an operation on him.¹³⁰

As long as the Universal Military Training and Service Act¹³¹ was in effect and the Army depended upon conscription for all or a part of its force, it could have been argued that forced submission to simple surgical procedure was appropriate. With the advent of the all-volunteer Army in January of 1973,¹³² forcing a member to submit to an unwanted medical treatment would not appear warranted. An all-volunteer Army will only consist of individuals who have enlisted. Consequently, those individuals not medically qualified should be administratively separated. In the first hypothetical, it is clear that the patient would not be required to submit to open heart surgery. In the second hypothetical, the patient (Johnny) should not be required to submit to medical treatment against his will even though the hernia is operable with excellent result expectancy.

In short, for purposes of morale and to satisfy legal requirements, military patients should be accorded all the consensual rights and privileges of civilian patients. This is true notwithstanding any differences that exist in the doctor-patient relationship and despite the fact that certain treatment could legally be given to military individuals without their consent.

The military's position would appear to be that a right to refuse medical care does not exist. The rules applied by the civilian courts are not so easily enunciated. The basic rule followed by civilian courts is that a conscious adult patient who is mentally competent has the right to refuse medical treatment, even when best medical opinion deems it essential to save his life.¹³³ Civilian

¹²⁹ *Id.* at 56.

¹³⁰ Rakestraw, *Malpractice and the Military Doctor*, U. S. AIR FORCE JAG BUL. (Nov. 1961) at p. 7.

¹³¹ U. S. Code 1964 Title 50, Appendix, 451 *et seq.*

¹³² See Washington Post articles, Sunday, January 28, 1973 and Saturday, September 2, 1972.

¹³³ See *Erickson v. Dilgard*, 252 N.Y.S. 2d 705 (S. Ct. 1962).

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courts have been forced to resolve difficult questions inherent in the patient's refusal to undergo recommended medical treatment and it is beneficial to analyze the civilian courts' reasoning to see if it can be applied to the apparent military position.

B. THE QUALIFIED RIGHT TO REFUSE MEDICAL TREATMENT

Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment.¹³⁴

While a competent individual will be allowed complete freedom in consenting to his own medical care, those with authority to consent for another, such as a parent, will not be allowed to make a choice inconsistent with good medical practice. Even the right of a pregnant patient to refuse treatment was held limited by the effect of the refusal on her unborn child. In *Raleigh Fitkin — Paul Morgan Memorial Hospital v. Anderson*¹³⁵ the New Jersey Supreme Court affirmed an order of the trial court authorizing the administration of blood necessary to save the life of a pregnant woman and her unborn child, stating:

We have no difficulty in so deciding with respect to the infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined and inseparable that it would be impractical to attempt to distinguish between them with respect to the sundry factual patterns which may develop.¹³⁶

Complex problems involving constitutional questions of personal liberty and freedom of religion for the patient are presented in cases involving the compulsory medical treatment of adults. The courts are in disagreement as to whether they possess the judicial power to order compulsory medical treatment over an adult's objection.

These cases fall into two general categories: (1) Where a physically incompetent patient was so weak that the court felt he could not make an appropriate choice on whether or not to refuse

¹³⁴ *Natanson v. Kline*, 186 Kan. 393, 406, 350 P. 2d 1093, 1104 (1960).

¹³⁵ 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964).

¹³⁶ *Id.* at 422, 201 A.2d at 538.

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life-saving treatment,¹³⁷ and (2) Where the patient, even though fully competent, has minor children or dependents.¹³⁸

In the landmark case of *Application of President and Directors of Georgetown College, Inc.*,¹³⁹ the patient, aged 25 and the mother of a 7-month-old child, was brought to the hospital having lost two-thirds of her body's blood supply from a ruptured ulcer. The woman's husband refused to consent to her having a blood transfusion on religious grounds; both husband and wife were Jehovah's witnesses. Since the woman's death was imminent, the hospital's counsel sought an order from the district court permitting the hospital to give the patient the blood transfusion. After the district court denied the hospital's request, application for relief was made to the circuit court of appeals. Circuit Judge Wright went to the hospital and conferred with the husband who still refused to consent to the transfusion. The husband gave Judge Wright permission to speak to his wife but the only audible reply the judge could get from the wife was "against my will." "It was obvious that the woman was not in a mental condition to make a decision."¹⁴⁰ In response to his inquiry whether she would oppose the transfusion if the court permitted it, the woman indicated, as best the judge could make out, that under those circumstances the responsibility was not then hers. The judge signed the order. In the subsequent written opinion, Judge Wright drew an analogy between the instant case and those cases in which children were subject to a compulsory order for medical treatment for serious illness or injury. The judge felt the correlation persuasive because the patient in the instant case was *in extremis* and hardly *compas mentis* at the time. The court pointed out that the patient was the mother of a 7-month-old child and that the state, as *parens patriae*, had an interest in preserving the life of the mother. The judge then stated: "The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was

¹³⁷ *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D. C. Cir. 1964), *reh. denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978.

¹³⁸ *United States v. George*, 239 F. Supp. 752 (D.C. Conn. 1965); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1963).

¹³⁹ *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), *reh. denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1963).

¹⁴⁰ *Id.* at 1007.

no time for research and reflection."¹⁴¹ A petition for rehearing *en banc* by the patient was later denied.¹⁴²

Illustrative of the proposition that a court will order medical care for a fully competent adult patient if the patient has minor children involved is *United States v. George*.¹⁴³ The patient, the 39-year-old father of four minor children, had voluntarily admitted himself to a VA hospital for the treatment of a bleeding ulcer. The patient refused blood transfusions because of his religious beliefs. Upon receipt of a telephone call from the government's attorney who indicated that the patient's condition had worsened (Court had previously denied oral motion for temporary restraining order because patient's condition was not extreme), the Court proceeded to the hospital. The medical testimony clearly indicated that the patient's blood loss was so great that standard medical care dictated the transfusion. "His condition was grave, and any further bleeding, without blood transfusion, would most likely lead to shock and probable death."¹⁴⁴ The patient appeared to the judge "to be coherent, rational and rather strong."¹⁴⁵ The patient stated "that he would not agree to be transfused but would in no way resist a court order permitting it, because it would be the court's will and not his own."¹⁴⁶ The court justified the granting of the order by stating that the rationale of the *Application of Georgetown College* case was being adopted. One of the factors the court considered was that the patient had minor children, reasoning that the state had an interest in preserving the life of the parent. Although the patient in this case was coherent and rational, this variance with the facts of *Application of Georgetown College* did not compel dissimilar results.

There is authority, however, that a court does not have the power to order medical treatment of an adult patient against his will. When a patient is fully competent and refuses medical treatment, and that refusal does not involve a danger to public health, welfare or morals nor involves minor children, the courts have not compelled submission to treatment.¹⁴⁷

*In Re Brooks Estate*¹⁴⁸ involved an adult patient who objected to a blood transfusion on religious grounds; no minor children

¹⁴¹ *Id.* at 1009.

¹⁴² 331 F.2d 1000 (D.C. Cir. 1964).

¹⁴³ 239 F. Supp. 752 (D.C. Conn. 1965).

¹⁴⁴ *Id.* at 753.

¹⁴⁵ *Id.* at 753.

¹⁴⁶ *Id.*

¹⁴⁷ *In re Brooks Estate*, 32 Ill. 2d 361, 205 N.E. 2d 435 (1965); *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S. 2d 705 (1962).

¹⁴⁸ 32 Ill. 2d 361, 205 N.E. 2d 435 (1965).

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were involved. The factual situation was similar to the factual situations in *George* and *Application of Georgetown College*. The court distinguished the other cases on the basis that they involved minor children. The court in discussing the *Application of Georgetown College* states:

There, the person alleged to be *in extremis* was the mother of minor children. The state might well have an over-riding interest in the welfare of the mother in that situation, for if she expires, the children might become wards of the state. Such reasoning is inapplicable here since all members of the Brooks family are adults.¹⁴⁹

A similar distinction was made in *Raleigh Fitkin — Paul Morgan Memorial Hospital v. Anderson*¹⁵⁰ where the same court that decided *Brooks Estate* held:

... authorizing blood transfusions for a nonconsenting Jehovah's Witness member who was quick with child is not here persuasive since the court there held it unnecessary to determine whether the mother could be compelled to accept a transfusion to save her own life because it was so inextricably interwoven with that of the child as to render it impracticable to distinguish between them.¹⁵¹

The court held that this patient could not be compelled to submit to a blood transfusion; no minor children were involved and no overt or affirmative act of the appellants offered any clear and present danger to society.

A similar conclusion was reached in *Erickson v. Dilgard*¹⁵² where a competent adult with no minor children resisted a blood transfusion. The court held there was no precedent to order medical treatment for a competent adult patient when no state interest was involved. It is submitted that when a fully competent patient, without minor children, declines medical treatment, his refusal should be determinative unless his refusal creates a danger to public health, welfare or morals.

The proposed rule was weakened in the recent case of *John F. Kennedy Memorial Hospital v. Heston*¹⁵³ The trial court had granted an application to administer a blood transfusion to a 22-year-old unmarried Jehovah's Witness.¹⁵⁴ When the patient

¹⁴⁹ *Id.* at 372, 205 N.E. 2d at 440.

¹⁵⁰ 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964).

¹⁵¹ 32 Ill. 2d 361, 372, 205 N.E. 2d 435, 440 (1965).

¹⁵² 44 Misc. 2d 27, 252 N.Y.S. 2d 705 (Sup. Ct. 1962).

¹⁵³ 58 N.J. 576, 279 A.2d 670 (1971).

¹⁵⁴ Jehovah's Witnesses rely on specific passages of the Bible which indicate that the soul of an individual is contained in his blood and it is improper to take blood into the human body; *Leviticus* 17:13, 14: "You must not eat the blood of any sort of flesh, because the soul of every sort of flesh is in its blood." Watch Tower Bible and Tract Society of Pa., *Blood, Medicine and the Law of God* 4 (1961).

recovered the decision was appealed to the New Jersey Supreme Court which held that an adult may be compelled to submit to medical treatment when it is deemed necessary to sustain life.¹⁵⁵ In reviewing the law in the area the court attempted to distinguish the *Brooks* case by suggesting that the *Brooks* finding of "no 'clear and present danger' warranting interference" test is appropriate with respect to free speech but "... is not the appropriate criterion ..." in this case. The court found the test in the instant case to be "whether there is a 'compelling state interest' justifying the state's refusal to permit the patient to refuse vital aid."¹⁵⁶ The court conceded that the court in *Brooks* considered the issue of state interest when it noted the patient involved did not have minor children who might become charges of the court. The New Jersey Supreme Court, however, maintained that the state has an interest in sustaining life, a consideration which is not apparent when the focus is upon a "clear and present danger."

C. ANALOGY TO SUICIDE AND EUTHANASIA

Definite distinctions exist between suicide and the refusal of medical care for religious reasons.¹⁵⁷ A patient who refuses medical treatment is not expressly seeking death; rather death is a possible or probable consequence of his refusal.

Suicide requires a specific intent to kill oneself, an intent that is not present in a refusal to accept treatment. Indeed, the patient's act of seeking hospitalization tends to negate any such intention.¹⁵⁸ The court considered this issue in *Application of President and Directors of Georgetown College, Inc.*¹⁵⁹ and resolved it by finding the patient wanted to live as evidenced by her voluntary presence in the hospital as a patient seeking medical assistance. The refusal to consent to medical care is a passive act. Criminal liability requires failure to act in violation of an affirmative duty and the patient cannot be said to have an affirmative duty to seek medical treatment.

It could be argued that the doctor is preventing a suicide because refusal is tantamount to causing one's own death and

¹⁵⁵ *Citing State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962).

¹⁵⁶ 58 N.J. 576, 582, 279 A.2d 670, 674 (1971).

¹⁵⁷ Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48, 68-70 (1954).

¹⁵⁸ See 33 FORDHAM L. REV. 513, 516 (1965); 26 MONT. L. REV. 95 (1965).

¹⁵⁹ 331 F.2d 1000 (D.C. Cir. 1964).

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suicide is a crime and the physician is preventing a crime. However, few people consider suicide a crime, few or none are prosecuted for attempted suicide, and only a few states even have suicide statutes.¹⁶⁰

The distinction between euthanasia and refusal to consent to medical care is based on the malfeasance — nonfeasance distinction. Most commentators think this distinction is more than a semantic deception and readily distinguish between death by an active process and death by a passive process. It is said that the objection to euthanasia is based upon "society's interest in the individual,"¹⁶¹ but this interest is not defined in any way.

D. CONSTITUTIONAL ASPECTS OF COMPULSORY MEDICAL TREATMENT

Although the constitutionality of compulsory medical procedures such as vaccinations and other treatment which protect society as a whole is not in doubt, the interest of an individual in maintaining the security and inviolability of his person free from undesired and unjustified interference under the First Amendment of the Constitution merits some discussion. For instance, it has been held that the right to freely exercise one's religious beliefs is not absolute and may be subordinated to the public interest when warranted.¹⁶²

The Supreme Court of the United States has set out two standards to determine when Constitutional guarantees may be overridden by other recognized interests. The Court has held that a state may compel action which may be repugnant to one's personal convictions only if some "clear and present danger"¹⁶³ or some "grave and immediate"¹⁶⁴ threat exists to the public health, safety, welfare or morals. State statutes which impose compulsory vaccination requirements have been upheld as a legitimate attempt by society to protect itself from the danger of contagious dis-

¹⁶⁰ 39 MINN. L. REV. at 68 (1954).

¹⁶¹ Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CAL. L. REV. 860 (1964); Note, *Compulsory Medical Treatment: The States' Interest Re-Evaluated*, 51 MINN. L. REV. 293 (1966).

¹⁶² *Sadlock v. Board of Education*, 137 N.J.L. 85, 58 A.2d 218 (1948). Compulsory vaccination of school children upheld despite religious and personal objections of the parents; *Bunn v. North Carolina*, 336 U.S. 942 (1949). Use of snakes prohibited in a religious ritual.

¹⁶³ *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1939).

¹⁶⁴ *W. Va. Board of Education v. Barnette*, 319 U.S. 624, 639 (1942).

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ease.¹⁶⁵ State action in such circumstances has been characterized as a manifestation of the concept that the individual must yield some of his personal rights to society in order to maintain the public health or welfare.¹⁶⁶

Holmes v. Silver Cross Hospital of Joliet, Illinois,¹⁶⁷ a leading case, outlines the contours of the free exercise clause of the first amendment and discusses the Constitutional aspects of such conflicting cases as *In Re Brooks Estate*¹⁶⁸ and *John F. Kennedy Memorial Hospital v. Heston*.¹⁶⁹ as well as the landmark case of *West Virginia State Board of Education v. Barnette*.¹⁷⁰ *Holmes* involved a blood transfusion given after the patient had expressed religious convictions precluding the transfusion.¹⁷¹ The court held that before the state may restrict a person's religious beliefs, it must proffer some substantial interest that it claims to possess, an interest that must be protected even at the cost of restricting the free exercise of religion by its citizens. In other words, the state must show that it is acting "to prevent grave and immediate danger to interests which the state may lawfully protect."¹⁷² The court stated:

The cases make it clear that the test for determining whether a state-imposed restriction upon religious freedom is valid is an *ad hoc* balancing test which examines the facts of each particular case, focusing upon the interests of the state and its citizens.¹⁷³

In re Brooks, a state court case, was not binding on the federal courts but the federal district court in *Holmes* gave it great deference. The court concluded:

... that a state-appointed conservator's ordering of medical treatment for a person in violation of his religious beliefs, no matter how well intentioned ... violates the First Amendment's freedom of exercise clause in the absence of some substantial state interest.¹⁷⁴

In conclusion, the cases that have been concerned with the issue of whether the patient has a right to refuse state ordered

¹⁶⁵ See note 159, *supra* and accompanying text.

¹⁶⁶ *Id.*

¹⁶⁷ 340 F. Supp. 125 (N.D. Ill. 1972).

¹⁶⁸ 32 Ill. 2d 361, 205 N.E. 435 (1965).

¹⁶⁹ *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A. 2d 670 (1971).

¹⁷⁰ 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

¹⁷¹ *Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125 (N.D. Ill. 1972).

¹⁷² *W. Va. Board of Education v. Barnette*, 319 U.S. 624, 639 (1942).

¹⁷³ 340 F. Supp. at 130.

¹⁷⁴ 340 F. Supp. at 130.

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medical treatment on religious principles are conflicting in result. It is submitted that the distinction made involving the state's interest in preserving the life of a parent as discussed in *Brooks* is valid, although some cases such as *John F. Kennedy Memorial Hospital v. Heston*¹⁷⁵ have broadened the definition of state interest to include "an interest in sustaining life." The *Holmes* case limits the application of the state interest doctrine to those cases where the state can show it is acting "to prevent grave and immediate danger to interests which the state may lawfully protect."¹⁷⁶

The Army procedure as set out in Army Regulation 600-20, would require the service member patient to submit to medical care.¹⁷⁷

This is contrary to the standards set forth in the civilian blood transfusion cases. Addressing the hernia hypothetical¹⁷⁸ it would be difficult to envision a court using the state interest definition of *Kennedy* saying that the state has an interest in hernia repair and the failure to submit to such a procedure certainly cannot be said to be a "grave and immediate danger to interests which the state may lawfully protect." It, therefore, seems clear that hernia repair is not such a situation to which the civilian courts would order medical care over the patient's objection.

It is conceded that the Army may have a broader interest in the individual soldier's health than the state does in the health of its citizen, and the military writers speak of "a duty to maintain himself in the best possible physical condition to perform his military duties."¹⁷⁹ The basic issue is then to reconcile the civilian standards with what appears to be the military "duty to be fit."

The Judge Advocate General's opinions¹⁸⁰ speak of the right to take measures short of danger to life, authorizing compulsory medical treatment, and compelling a soldier, forcibly without consent, to submit to surgery. As was previously pointed out, these opinions were usually qualified and referred to "time of war or other national emergency,"¹⁸¹ discussing the need for military

¹⁷⁵ See note 150, *supra*.

¹⁷⁶ W. Va. Board of Education v. Barnette, 319 U.S. 624, 639 (1942).

¹⁷⁷ AR 600-20, para. 5-35f.

¹⁷⁸ See, text p. 139 *supra*.

¹⁷⁹ Rakestraw, *Malpractice and the Military Doctor*, U.S. AIR FORCE JAG BUL. (Nov. 1961).

¹⁸⁰ See notes 118-122 *supra* and accompanying text.

¹⁸¹ JAGA 1951/2300 (March 16, 1951).

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manpower in this content. In the coming era of an all-volunteer Army, in time of peace or at least in the absence of a national emergency, it is suggested these opinions may not be as persuasive as when originally rendered.

It is, therefore, proposed that "the duty to be fit" requirement be eliminated and that the civilian standards involving imposition of unwanted medical treatment be applied to the military. This would involve a radical alteration of Section IV, Army Regulation 600-20 or deletion of the section altogether. If the patients in the hypotheticals refused surgery or treatment and this refusal did not violate an Army interest or constitute a grave and immediate danger under this state of the law, they would be separated from the Army with appropriate benefits (or lack of benefits). With no conscription, in the absence of war or national emergency and with pay on a theoretical par with civilian industry, it is suggested that there is no longer "a duty to maintain himself in the best possible physical condition" and a military serviceman should be treated by the Army as a civilian employee would be treated by his civilian employer. This approach, more compatible with individual rights, would allow a service member to be free of an unwanted touching in medical care, particularly where the individual's life is not immediately at stake.

VII CONCLUSION

Although the medical treatment of a service member is subject to unique rules and regulations, it is still considered desirable and necessary to obtain the patient's informed consent to the medical treatment, a consent which satisfies all legal requirements. Many of the difficulties in this area could be avoided if an express, informed consent is obtained from all competent patients. Although oral consent is as legally binding as written consent, written consent is preferred when there is a danger to the life, the health or the well-being of the patient because of the evidentiary problems involved in establishing oral consent. One recommendation in this area is that Standard Form 522 be amended thus avoiding the problems inherent in general or blanket authorizations as discussed in *Rogers v. Lumbermen's Casualty Company*.¹⁸² Perhaps, it would be best to use a dual consent procedure: a general consent form would be used for routine admissions and treatment while another specific consent form would be used for particular

¹⁸² 119 So. 2d 649 (1960).

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surgical procedures. The medical practitioner would be required to indicate, over his signature, that he has counselled the patient concerning the nature, the risks and the expected results of the contemplated procedures. If a specific disclosure is required to insure an informed consent, the military physician should consult the Judge Advocate to determine the practice followed in the local civilian community.¹⁸³

After explanation by hospital admission personnel, the general consent form should be signed by the patient when he is admitted to the hospital as part of the admission procedure. This general consent form would provide a written record of the patient's consent to routine hospital services, diagnostic procedures and medical treatment. The danger from its use stems from unwarranted reliance upon it as authorization for specific procedures such as surgery, for which it is not designed and for which it would not be any more effective than the blanket consent form.

A special consent form should be signed by the patient prior to every medical or surgical procedure other than routine treatment discussed in the preceding paragraph. It should include all major and minor surgery that involve an entry into the body, all procedures involving anesthesia, nonsurgical procedures involving risk of harm such as myelograms, arteriograms or pyelograms, any procedure involving the use of cobalt or x-ray therapy, electroshock therapy, and any type of experimental or innovative procedures. Completion of the special consent form should not be accomplished in the admission office. It should be completed *personally* by the physician in order that he may answer the patient's questions concerning the proposed nonroutine procedure. Use of the special consent form presupposes complete disclosure in the conversation between the physician and patient.

It is also suggested that the regulation dealing with the refusal to submit to medical care¹⁸⁴ be substantially revised. Notwithstanding the authorities cited, the right to the inviolability of the person is protected by the first and fifth amendments and servicemen should enjoy this right in time of peace. The serviceman should not be subjected to either compulsory treatment (with certain exceptions) or potential disciplinary action under the Uniform Code of Military Justice.¹⁸⁵ The rights of the individual

¹⁸³ The reason for this recommendation stems from the increasing trend as exemplified in Paragraph 5 of AR 40-3 to follow and accept local civilian standards.

¹⁸⁴ AR 600-20, § IV.

¹⁸⁵ The fact that a serviceman is protected by the Bill of Rights can no

outweigh the military claim of imposing unwanted surgery under the guise that it is "reasonably necessary to safeguard and protect the morale, discipline and usefulness of members of the armed forces."¹⁸⁶

As previously indicated, physical examinations and immunizations can be distinguished from surgical procedures and consequently an order to submit to such immunizations or the forceable imposition of such immunizations is lawful as reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of the military.¹⁸⁷ However, any unreasonable force applied in such a manner that would shock the conscience of an ordinary person would violate the due process clause of the Constitution.¹⁸⁸

Therefore, a Regulation should be promulgated to insure that basic rights are accorded those refusing medical or surgical treatment and Paragraph 5-35 Army Regulation 600-20 should be revised and amended to prohibit forced surgery and to prevent an individual from being subjected to disciplinary action upon his refusal to consent to such medical care.

It is not suggested that the patient right remain inviolate at all times and under all circumstances. In time of war, or even in times of military build-up, it may be necessary in obtaining maximum military manpower to provide remedial medical treatment in order to maintain active duty strength. However, at this time the strength of the Army has been and is being reduced; an all-volunteer Army is emerging and the need of the Army to retain individuals on active duty against their will by imposing medical treatment is considered neither desirable nor necessary.

The Army is not without recourse. The person who refuses to consent or submit to reasonable medical care should be separated from the service for medical reasons.

longer be disputed. See *Burns v. Wilson*, 346 U.S. 137 (1953) and *Quinn, The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 232 (1961).

¹⁸⁶ *United States v. Martin*, 1 U.S.C.M.A. 647, 676, 5 C.M.R. 102, 104 (1952).

¹⁸⁷ *United States v. Baker*, 11 U.S.C.M.A. 313, 29 C.M.R. 129 (1960).

¹⁸⁸ *United States v. Rochin*, 342 U.S. 165 (1952); *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

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APPENDIX

The following state-by-state analysis provides a source reference to materials in each state which may assist in resolving issues regarding the effectiveness of a minor's consent to treatment in the light of Paragraph 5, Army Regulation 40-3:

Alabama: ALA. CODE ANN. tit. 34, §76 (Recomp. Vol. 1959); tit. 34, § 76.1 (Supp. 1971); Public Act No. 2281 (Laws 1971).

Men and women attain majority at 21 years of age or at 18 years of age if married or widowed. A minor who is 14 years of age or older, or has graduated from high school, or is married, divorced, or pregnant, may consent to medical, dental, health or mental health services for his or her child. Any minor may consent to examination and treatment of venereal disease, pregnancy, drug dependency, alcohol toxicity, or any reportable disease. The consent of a parent or guardian is also not required for treatment where, in the judgment of the physician, a delay in providing such treatment would increase the risk to the minor's life, health or mental health.

Alaska: ALASKA STAT. §§ 25.20.010, 25.20.020 (1965); § 09.65.100 (Supp. 1971)

Men and women attain majority at 19 years of age. Women attain majority upon marriage. A minor may consent to examination and treatment relating to venereal disease. A female over the age of 15 years may consent to examination and treatment relating to pregnancy.

Arizona: ARIZ. REV. STAT. ANN. § 1-215 (Supp. 1971-72, as amend ch. 146, Laws 1972); § 44-132 (1967); §§ 44-132.01, 44-133.01, 44-134, 44-135 (Supp. 1971-72).

Men and women attain majority for certain purposes at 18 years of age. Emancipated and married minors may consent to medical and surgical care. Any minor may consent to examination and treatment for venereal disease. A minor 12 years of age or older, found by a physician to be drug dependent, may consent to hospital and medical care related to his drug dependency. A minor 18 years of age or older, who is otherwise competent, may consent to blood donation and penetration of tissue necessary to the donation at a federally-approved blood bank. A female minor, 12 years of age or older, who is alleged to be the victim of rape, may consent to necessary examination and care.

Arkansas: ARK. STAT. ANN. § 57-103 (1947); §§ 82-629, 82-1606 (Supp. 1971).

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Men attain majority at 21 years of age. Women attain majority at 18 years of age. A minor may consent to examination and treatment relating to venereal disease. A minor 18 years of age or older may donate or sell blood to any nonprofit blood bank or licensed hospital without parental consent.

California: CAL. CIV. CODE ANN. § 25 (1954, as amended, ch. 38, Laws 1972); § 34.5 (1954); §§ 25.6, 34.6, 34.7 (Supp. 1972).

Men and women attain majority at 18 years of age. Married minors may consent to medical and surgical care. An unmarried pregnant minor may consent to medical and surgical care related to her pregnancy including a therapeutic abortion [*Ballard v. Anderson*, 95 Cal. Rptr. 1, 484 P.2d 1345 (1971)]. Any emancipated minor who is at least fifteen years of age may consent to hospital, dental, medical or surgical care. A minor who is at least twelve years of age may consent to medical or surgical treatment of any infectious, contagious or communicable disease, which is required to be reported to the local health officer.

Colorado: COLO. REV. STAT. ANN. §§ 135-1-2, 153-1-1 (1963); §§ 66-9-2 (1963, as amended Supp. 1967); §§ 41-2-11 to 13 (Laws 1971).

Men and women attain majority at 21 years of age. A minor may consent to examination and treatment for venereal disease and drug addiction. A minor 18 years of age or older may consent to medical, dental, and surgical care, and to blood donation and penetration of tissue necessary to the donation. An emancipated or married minor, 15 years of age or older, may consent to medical, dental and surgical care. A minor parent may consent to care for his child or ward.

Connecticut: CONN. GEN. STAT. ANN. §§ 19-89a, 19-496c, 19-139k, 19-142a (Supp. 1972-73).

Men and women attain majority as at common law. A minor may consent to examination and treatment for venereal disease or for addiction to or the effects of a controlled drug, as defined in CONN. GEN. STAT. § 19-443 (1968), provided by any public or private hospital or clinic, municipal health department, or state institution or facility. Any person 18 years of age or older may consent to medical, dental, health and hospital services, including consent to transplant to or from himself of organs susceptible of transplant other than after death, and to being a blood donor in any voluntary and noncompensatory blood program. A minor who has been married or has borne a child may consent to medical, dental, health and hospital services for his child.

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Delaware: DEL. CODE ANN. c. 13, §§ 707, 708, 710 (Supp. 1970).

Men and women attain majority as at common law. Married minors may consent to medical and surgical care. A minor 12 years of age or over may give written consent to diagnosis and treatment of pregnancy, including abortion, or of contagious, infectious, or communicable diseases. Any person over 17 years of age may consent to blood donation and necessary tissue penetration in any voluntary and noncompensatory blood program.

District of Columbia: P.L. 91-268 (Laws 1970).

Men attain majority as at common law. A woman at least 18 years of age or married may consent to any form of medical treatment. *See In re Boe*, 322 F. Supp. 872 (D.D.C. 1971).

Florida: FLA. STAT. §§ 743.01, 384.061, 743.06 (Supp. 1972-73); ch. 72-130, 72-132 (Laws 1972).

Men and women attain majority at 21 years of age or upon marriage. A minor may consent to examination and treatment for venereal diseases. Any minor may receive emergency medical care or treatment administered by a licensed hospital or in a college health center if parental consent is not immediately obtainable. A minor who is married, a parent, or pregnant, or who has the consent of a parent or guardian, or who may suffer probable health hazards if the services are not rendered, may receive maternal health and contraceptive information and services of a nonsurgical nature. Application of a nonpermanent internal contraceptive device is not deemed to be a surgical procedure. A minor 18 years of age or older may consent to a blood donation and the tissue penetration necessary for the donation in a non-compensatory blood program.

Georgia: GA. CODE ANN. § 74-104 (Rev. Vol. 1964); §§ 74-104.1 to 74-104.3, 48-111, 48-402 (Supp. 1971); §§ 88-2904, 88-2907 (Rev. Vol. 1971).

Men and women attain majority at 21 years of age. A minor who is 18 years of age or married may consent to medical and surgical care for himself or his spouse. Any female may consent to medical and surgical care relating to pregnancy or childbirth. A minor parent may consent to treatment for his child. Any person 18 years of age or older may refuse to consent to medical or surgical treatment as to his own person. A minor may consent to medical and surgical care relating to venereal disease and drug abuse. A minor 18 years of age or older may consent to being a blood donor.

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Hawaii: HAWAII REV. LAWS tit. 31, c. 577, § 1 (1968, as amended S.B. No. 1318, Laws 1972); tit. 31, ch. 577A, § 2 (Supp. 1971).

Men and women attain majority at 18 years of age. Minors may consent to medical and surgical care related to pregnancy or venereal disease.

Idaho: IDAHO CODE ANN. § 32-101 (1963, as amended ch. 117, Laws 1972); §§ 39-3701, 39-3402 (Supp. 1971); § 37-3102 (Supp. 1971, as amended ch. 149, Laws 1972); § 39-3801 (Supp. 1971).

Men and women attain majority at 18 years of age or when married. A minor 14 years of age or older may consent to examination and treatment for any infectious, contagious or communicable disease. Any minor may consent to examination and treatment related to drug dependency. Any person 18 years of age or older may give all or any part of his body for research or transplantation purposes and may consent to donation of blood in a voluntary and noncompensatory blood program.

Illinois: ILL. STAT. ANN. tit. 91, §§ 18.1 to 18.5, 18.7; tit. 3, § 131 (Supp. 1972).

Men and women attain majority at 18 years of age. A minor who is married or pregnant may consent to medical and surgical care. A minor parent may consent to treatment for his child. A minor 18 years of age or older may consent to donating blood in a voluntary and noncompensatory blood program. A minor who is married, pregnant or a parent may consent to birth control services and information. The consent of any other minor will also be sufficient when failure to provide the services would create a serious health hazard or when the minor is referred for services by a physician, clergyman or planned parenthood agency. A minor 12 years of age or older may consent to examination and treatment for venereal disease.

Indiana: IND. ANN. STAT. §§ 35-4409 to -4412 (Supp. 1971).

Men and women attain majority at 21 years of age. A married minor living with his or her spouse and emancipated minors may consent to medical and surgical care. A minor parent may consent to treatment for his child. A minor may consent to examination and treatment for venereal disease. A minor 18 years of age or older may consent to being a blood donor in a voluntary and noncompensatory blood program.

Iowa: IOWA CODE § 599.1 (1950); §§ 140.9, 599.6 (Supp. 1972).

Men and women attain majority at 21 years of age or when married. Minors who are 16 years of age or older may consent to

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medical care related to venereal disease. Any person 18 years of age or older may donate blood to any voluntary and noncompensatory blood program.

Kansas: KAN. STAT. ANN. §§ 38-101, 38-122, 38-123, 65-2892 (Supp. 1971); S.B. No. 91 (Laws 1971).

Men and women attain majority at 21 years of age or at 18 years of age if married. An unmarried pregnant minor may consent to medical and surgical care related to her pregnancy where no parent or guardian is available. A minor parent may consent to treatment for his child. A minor may consent to examination and treatment for venereal disease and drug abuse.

Kentucky: KY. REV. STAT. § 2.015 (Supp. 1971); ch. 104 (Laws 1970).

Men and women attain majority at 18 years of age for most purposes including consent to medical and surgical care. A minor may consent to examination and treatment of venereal disease. *Louisiana*: LA. CIV. CODE ANN. arts. 35, 27, 379, 382 (1952); LA. REV. STAT. ANN. 40:1065.1 (Supp. 1972).

Men and women attain majority at 21 years of age or at 18 years of age if married. A minor may consent to examination and treatment for venereal disease.

Maine: Ch. 598 (Laws 1972); ME. REV. STAT. ANN. tit. 32, § 3154 (Supp. 1972).

Men and women attain majority at 18 years of age. A minor may consent to treatment of venereal disease and problems related to drug abuse.

Maryland: MD. CODE ANN. Rules of Procedure rule 5, § r (Repl. Vol. 1963); art. 43, § 135 (Supp. 1972); art. 43, §§ 76A, 135A (Repl. Vol. 1971).

Men and women attain majority at 21 years of age. A minor who is 18 years of age or older, or who is married, or is a parent, may consent to medical treatment. Any minor may consent to treatment and advise for venereal disease, drug abuse, pregnancy, and contraception, excluding sterilization. The consent of any other minor will also be sufficient where in the opinion of the treating physician a delay in rendering treatment to obtain consent of another would endanger the health or life of the minor. A minor 18 years of age or older may consent to being a blood donor, provided he receives no monetary compensation for the

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donation, and to treatment for emotional disorders by a physician or clinic.

Massachusetts: MASS. GEN. LAWS ANN. ch. 111, § 184C (1971); ch. 112, § 12E (Supp. 1972).

Men and women attain majority as at common law. A minor 18 years of age or older may consent to being a blood donor. A minor found by two physicians to be drug dependent, may consent to hospital and medical care related to his drug dependency.

Michigan: MICH. COMP. LAWS §§ 722.51 to 722.55; 329.221; 701.19b (Supp. 1972).

Men and women attain majority at 18 years of age. A minor may consent to examination and treatment for venereal disease. A minor 14 years of age or older may donate one kidney to a parent, sibling, or to his child, when authorized by order of the probate court having jurisdiction over his person.

Minnesota: MINN. STAT. ANN. § 525.80 (1969); § 645.45(14); (1947); § 145.41 (1970); §§ 144.341 to 144.347 (Supp. 1972-73).

Men and women attain majority at 21 years of age. An emancipated minor, or a minor who has been married or has borne a child, may consent to medical, mental, dental and other health services for himself or for his child. A minor may consent to medical, mental, dental and other health services to determine the presence of or to treat pregnancy, venereal disease, alcohol or drug abuse. Any person 18 years of age or over can donate blood in any voluntary and noncompensatory blood program.

Mississippi: MISS. CODE ANN. § 681, 684 (Recomp. Vol. 1957); §§ 7129-81, 8893.7 (Supp. 1971); ch. 333, 362 (Laws 1972).

Men and women attain majority at 21 years of age. Married and emancipated minors may consent to medical and surgical care. An unmarried pregnant minor may consent to medical and surgical care. An unemancipated minor of sufficient intelligence to understand the proposed medical or surgical treatment may give effective consent. A minor parent may consent to treatment for his child. A minor may consent to examination and treatment for venereal disease. Any person who is 18 years of age or older may consent to the donation of his or her blood and to necessary tissue penetration. The legal disabilities of any minor aged 18 years or over are removed for such blood donation purposes.

Missouri: MO. ANN. STAT. § 475.010 (1959); §§ 431.061 to 431.065 (Supp. 1971-72).

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Men and women attain majority at 21 years of age. A minor may consent to examination, treatment, hospitalization, and medical and surgical care for venereal disease, drug or substance abuse, and pregnancy, but not to an abortion. Any person 18 years of age or older may donate blood voluntarily, but may not receive compensation without the written authorization of a parent or guardian.

Montana: MONT. REV. CODES ANN. § 75-8702 (Supp. 1972); § 64-101 (Repl. Vol. 1962, as amended Supp. 1972); § 69-6101 (Repl. Vol. 1970); § 69-6106 (Supp. 1972).

A minor is a male or female who has not attained the age of 19 years. A minor may consent to care related to pregnancy and the treatment of venereal disease. A married minor or one who professes to be married may consent to medical and surgical care. A minor may consent to psychiatric or psychological counseling where the need is urgent and the consent of the spouse, parent, custodian or guardian of the minor cannot be obtained in time to offset danger to life or safety.

Nebraska: NEB. REV. STAT. § 38-101 (Reissue 1968); § 71-1119 (Cum. Supp. 1967).

Men and women attain majority at 20 years of age or when married. A minor may consent to examination and treatment for venereal disease.

Nevada: NEV. REV. STAT. §§ 129.010 to 129.070 (1971).

Men attain majority at 21 years of age. Women attain majority at 18 years of age. Married and emancipated minors may consent to medical and surgical care. A minor may consent to examination and treatment for venereal disease and drug abuse. Any person 18 years of age or older may donate blood.

New Hampshire: N.H. REV. STAT. ANN. §§ 571:24-a, 318-B:12-a (Supp. 1971).

Men and women attain majority as at common law. A minor 12 years of age or older may consent to treatment related to drug use. Any minor who is married, or is 18 years of age or older, may donate blood in any voluntary and noncompensatory blood program.

New Jersey: N.J. STAT. ANN. § 30:4c-2(b) (1964); §§ 9:17A-1, 9:17A-4, 9:17A-6 (Supp. 1971, as amended ch. 355, Laws 1971).

Men and women attain majority as at common law. Married minors may consent to medical and surgical care. An unmarried minor may consent to care related to her pregnancy. A minor parent may consent to treatment for his child. A minor who is

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or professes to be afflicted with venereal disease may consent to medical or surgical care related to the disease. Any person 18 years of age or older may donate blood in any voluntary and non-compensatory blood program.

New Mexico: NEW MEX. STAT. ANN. § 12-12-1 (Repl. Vol. 1968); §§ 12-3-41, 12-3-42 (Supp. 1971).

Men and women attain majority at 18 years of age. Married and emancipated minors may consent to medical and surgical care. A minor may consent to examination and treatment for venereal disease and pregnancy.

New York: N.Y. DOM. REL. LAW § 2 (1964); N.Y. Public Health Law § 2305.3 (1971).

Men and women attain majority at 21 years of age. A minor may consent to examination and treatment for venereal disease. *North Carolina*: N.C. GEN. STAT. §§ 48A-2, 90-21.5, 90-220.11 (Supp. 1971).

Men and women attain majority at 18 years of age. A minor who is emancipated may consent to medical treatment, dental and health care services for himself or for his child. Any minor may consent to examination and treatment for venereal disease. Any person 18 years of age or older may consent to donation of blood to any individual, hospital, blood bank or blood collection center. *North Dakota*: N.D. CENT. CODE ANN. §§ 14-10-01, 14-10-17, 14-10-18 (Supp. 1971).

Men and women attain majority at 18 years of age. A minor 14 years of age or older may consent to examination and treatment for venereal disease. Any person 18 years of age or older may donate blood.

Ohio: OHIO REV. CODE ANN. § 3109.01 (Baldwin 1965); §§ 3709.-241, 3717.012, 2108.21 (Supp. 1972).

Men and women attain majority at 21 years of age. A minor may consent to diagnosis and treatment for venereal disease and drug abuse. Any person 18 years of age or older may consent to donation of blood in a voluntary, noncompensatory blood program. *Oklahoma*: OKLA. STAT. ANN. tit. 15, § 13 (1966); tit. 63, §§ 2152, 1-532.1 (Supp. 1971-72).

Men attain majority at 21 years of age. Women attain majority at 18 years of age. Males 18 years of age and older may donate blood without parental consent, as long as no compensation is given for the donation. Any minor may consent to examination and treatment for venereal disease.

Oregon: ORE. REV. STAT. §§ 109.510, 109.520, 109.610 to 109.660 (Repl. Part 1971).

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Men and women attain majority at 21 years of age or when married. A minor who is 18 years of age or older may make a valid and binding contract. It is suggested that this provision may be taken to permit an 18-year-old minor to give effective consent to medical, dental and health care services. A physician may provide birth control information and services to any person without regard to age. A minor 15 years of age or older may consent to hospital care and medical or surgical and dental diagnosis or treatment. A minor 12 years of age or older may consent to treatment of venereal disease. Any person 18 years of age or over can donate blood in any voluntary and noncompensatory blood program.

Pennsylvania: PA. STAT. ANN. tit. 35, §§ 10101 to 10105 (Supp. 1971).

A person who is 18 years of age, or has graduated from high school, or has been married or has been pregnant may consent to medical, dental and health services. A minor parent may consent to medical treatment for his or her child. Any minor may consent to examination or treatment of pregnancy, or venereal disease, or any other reportable disease. A physician acting in good faith may rely upon the consent of a minor who professes to be one whose consent alone is sufficient. A person 18 years of age or older may consent to donating blood in a voluntary and noncompensatory blood program.

Rhode Island: R.I. GEN. LAWS ANN. § 23-50-1 (Supp. 1971); chs. 90, 145 (Laws 1971); § 15-12-1 (ch. 20, Laws 1972).

Men and women attain majority at 18 years of age. Any person 18 years of age or over can donate blood in any voluntary and noncompensatory blood program. A person 18 years of age or older may consent to examination and treatment for illness resulting from administration of drugs. A minor 16 years of age or older, or married, may consent to routine emergency medical or surgical care. A minor parent may consent to treatment of his child.

South Carolina: S.C. CODE ANN. §§ 11-157, 32.560 (Supp. 1971).

Men and women attain majority as at common law. Married minors may consent to medical or surgical care and a minor parent may consent to treatment for his child. A minor spouse may consent to medical or surgical care for his or her spouse. A minor 18 years of age or older may consent to being a blood donor.

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South Dakota: S.D.C.L. §§ 26-1-1, 26-2-7 (Supp. 1972) ; § 34-23-16 (Supp. 1971).

Both men and women attain majority at 18 years of age. A person 18 years of age or older may consent to being a blood donor. A minor may consent to diagnosis and treatment for venereal disease.

Tennessee: TENN. CODE ANN. §§ 1-313, 53-1104, 53-4607, 53-4608, 53-4401 (Supp. 1971).

Men and women attain majority at 18 years of age. A minor may consent to examination and treatment relating to venereal disease. A minor who is married, pregnant, or a parent may consent to contraceptive supplies and information. The consent of any other minor who requests and is in need of such information, who has been referred for such services by a physician, clergyman, family planning clinic, school, or state agency, will also be sufficient. A minor who is legally married may consent to a sterilization of convenience.

Texas: TEXAS CIVIL STATS. arts. 4445b, 4447h, 4447i, 4447j (Supp. 1972).

Men and women attain majority at 21 years of age. Any person, regardless of age, may consent to examination and treatment for venereal disease. Where neither parent of a minor child is available, consent to medical care for such minor may be given by any grandparent, adult brother or sister, adult aunt or uncle, or the legal guardian of the minor at the time the consent is given, in absence of notice to the contrary. Any other person who has custody of the minor may give consent if he has an affidavit signed by one or both parents authorizing him to do so. Article 4447h provides that custody means immediate and direct control over a minor child unless the context requires a different meaning. A minor 13 years of age or older may consent to examination and treatment for any condition related to drug use. Any person 18 years of age or older may donate blood to the American Red Cross, a blood bank supervised by a licensed physician, or to a hospital, but may not receive compensation.

Utah: UTAH CODE ANN. § 15-2-1 (Repl. Vol. 1962) ; §§ 15-2-5, 26-6-39.1 (Supp. 1971).

Men attain majority at 21 years of age or when married. Women attain majority at 18 years of age or when married. A minor 18 years of age or older may consent to donate blood and to medical procedures necessary to donation. Any minor may con-

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sent to medical care or services for actual or suspected venereal disease.

Vermont: VT. STAT. ANN. tit. 1, § 173; tit. 18, §§ 4226, 1671 (Supp. 1971).

Men and women attain majority at 18 years of age. A minor 12 years of age or older may consent to examination and treatment for drug dependency and venereal disease. Any person 18 years of age or older may donate blood in a voluntary and non-compensatory blood program.

Virginia: VA. CODE ANN. § 32-137 (Repl. Vol. 1969); §§ 18.1-62 to -62.3 (Supp. 1971); ch. 183 (Laws 1971).

Men and women attain majority as at common law. Any person 18 years of age or older who has been separated from the custody of his parent or guardian may consent to medical and surgical care. Any minor may consent to examination and treatment for venereal or other reportable, contagious diseases, and to medical care required for drug addiction, birth control, pregnancy, and family planning. A female 18 years of age or older who is separated from the custody of her parent or guardian may consent to a justified termination of pregnancy. A minor 18 years of age or older may consent to a blood donation to a nonprofit blood bank or licensed hospital.

Washington: WASH. REV. CODE §§ 70.24.110, 26.28.010 (Supp. 1971).

All persons are deemed to be of full legal age for all purposes upon reaching 18. This includes capacity to make decisions in regard to their own bodies and the bodies of their lawful issue whether natural born or adopted including but not limited to consent to surgical operations. A minor 14 years of age or older can consent to examination and treatment for venereal disease.

West Virginia: W.VA. CODE ANN. §§ 2-2-10, 2-3-1 (H.B. No. 667, Laws 1972); § 16-4-10 (Supp. 1971).

Men and women attain majority at 18 years of age. A minor may consent to examination and treatment of venereal disease. A person 18 years of age or older may consent to being a blood donor.

Wisconsin: WIS. STAT. § 990.01 (20) (1958), as amended ch. 213, (Laws 1971).

Men and women attain majority at 18 years of age.

Wyoming: WYO. STAT. ANN. § 14-1.1 (Supp. 1971).

For all purposes under Wyoming law, a person of the age of 18 shall be considered to have reached majority.



FLAG DESECRATION, SYMBOLIC SPEECH AND THE MILITARY*

by Captain Robert M. Frazee**

I. INTRODUCTION

From the earliest periods in the history of mankind, banners, standards, and flags have been adopted as symbols of the power and history of the people who bore them. It would have been extraordinary if our founding fathers had not adopted a flag to be recognized as the emblem of the new and independent American Republic. It has been our symbol in many wars, being carried into battle by our troops and reverently draping the caskets of those who fell. It signifies our national presence on ships, airplanes, schools, and army posts. It has been planted on the moon by the Apollo astronauts. Wherever it flies, it signifies the presence of the United States. The flag, by tradition, has been utilized as a campaign poster, a military recruiting poster, and as an eye-catching backdrop for the effective transmission of ideas. Presently living in the United States are two generations of citizens who grew up beginning the school day with "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands" ¹ Thus, unlike our British cousin who directs his national allegiance to the Crown, an American focuses his nationality, patriotism, and entire national being on the flag of the United States.

The flag has been used to express loyalty to the United States and the American ideals. The President of the United States

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¹ Pledge of Allegiance to the Flag, 36 U.S.C. §172 (1970).

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wears a small flag on the lapel of his suit; flags are carried at the beginning of every parade; all football and baseball games start with the raising of the "Stars and Stripes" to the tune of the National Anthem; and political candidates depict the flag on their campaign buttons and posters. None of these uses of the flag is thought improper by the American public.

It is not surprising that during the height of the Vietnam conflict those individuals opposing the United States' involvement should seize upon the flag as a vehicle to dramatize their opinions and beliefs. Americans, who up to this time had become accustomed to many forms of protest, became outraged at the spectacle of the American flag being lowered from its staff, trampled underfoot, and "desecrated."

The flag was used by those who were protesting against governmental action. It was burned on the courthouse steps,² sewn to the seat of trousers,³ cut apart and fashioned into a vest,⁴ and sewn upside down on the back of shirts and jackets.⁵ In one of the most popular musical plays of this era, a scene depicted a draftee being cloaked in a flag while the following song was sung:

Folding the flag is taking care of the nation. Folding the flag is putting it to bed for the night. I fell through a hole in the flag; I'm falling through a hole in the flag. Help! Don't put it down, best one around, crazy for the red, blue, and white. Crazy for the red, blue, and white. You look at me; what do you see? Crazy for the white, red, and blue; crazy for the white, red, and blue. 'Cause I look different you think I'm subversive; crazy for the blue, white, and red. My heart beats true for the red, white, and blue. Crazy for the blue, white, and red. Crazy for the blue, white, and red—and yellow, free. Crazy for the blue, white, red and yellow.⁶

The city of Atlantia, Georgia, withheld the use of the Civic Auditorium for performance of the musical claiming it would

² Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

³ Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974).

⁴ People v. Cowgill, 274 Cal.App.2d Supp. 923, 78 Cal. Rptr. 8531 (1969), *appeal dismissed per curiam*, 396 U.S. 371 (1970).

⁵ Oldroyd v. Kugler, 327 F. Supp. 176 (D.N.J. 1970). In addition to these acts which physically destroyed the flag, the flag design has been altered in many forms; Milton v. Young, 328 F. Supp. 88 (E.D. Tenn. 1971) writing "Give Peace a Chance" across the flag; Gwathmey v. Town of East Hampton, 347 F.2d 351 (2d Cir. 1970) placing the peace symbol in the blue field instead of the stars; Jones v. Wade, 388 F. Supp. 441 (N.D. Tex. 1972) superimposing a peace symbol over the entire flag; Oldroyd v. Kugler, *supra*, painting two stars red. Recently the ecologists have entered their own design with a bumper sticker showing the flag with green and white stripes and stars on a field of green.

⁶ "Don't Put It Down," Hair, Ragni, Rado, MacDermot, Copyright 1968, R.C.A., New York, N.Y.

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violate the Georgia flag desecration statute.⁷ The shock of hearing "Old Glory" referred to as the "blue, white, and red" can easily be imagined.

To counterbalance this "unAmerican" conduct, flag decals suddenly appeared everywhere. *The Reader's Digest* distributed a flag decal in one issue with the recommendation that it be affixed to an automobile window.⁸ When construction workers placed similar decals on their hard hats, they were praised by President Nixon, and many city police forces added a flag patch to their uniforms. Americans did not raise their voices in protest because of these uses of the flag. This conduct demonstrated a love of country, a patriotism that was consistent with acceptable uses of the flag. Congress, having left flag protection to the states since the flag's adoption in 1777, enacted a flag desecration statute that provided that it was a criminal act for anyone to "knowingly cast contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it . . ."⁹

Whenever the flag was used to protest against governmental action, the actor would claim that his conduct was protected as free speech. Although freedom of speech is protected by the first amendment,¹⁰ certain restrictions on the exercise of this right are accepted. The Supreme Court has stated:

It is . . . clear that a state may by general and nondiscriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.¹¹

These legislative restrictions, however, are only valid if they are not discriminatorily applied. If the issuing authority may exercise judgment over who will be given a permit based on any factor other than time, place, and manner, the ordinance will be struck down as unconstitutional because it may result in the prior

⁷ *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

⁸ Feb. 1969, at 104. The *DIGEST* offered additional decals for sale at a nominal cost. The Department of Defense ordered 1.5 million. Mar. 1969, at 190.

⁹ *Desecration of the Flag of the United States*, 18 U.S.C. §700 (1970).

¹⁰ U.S. CONST. amend. I, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedoms of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for the redress of grievances."

¹¹ *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

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censorship of diverse opinions. Likewise, the Supreme Court has held that a state may protect the public peace by prohibiting the utterance of fighting words.¹²

Since the government must allow diverse opinions to be exchanged in the marketplace of ideas, the police have a duty to protect the protestor from harm rather than arresting him for a breach of the peace.¹³ When the speaker passes beyond the bounds of argument and persuasion, however, and undertakes to incite a riot he may be arrested and removed from the scene.¹⁴ The state, therefore, may prohibit the expression of ideas when there is a substantial public interest and there is a "clear and present danger" that the evil which the state has a right to protect against may come about.¹⁵

Americans, granted these freedoms by the Constitution, are not content to merely express their dissent vocally on the street corner; they like to act out their protests to wider audiences. The presence of television with its emphasis on visual communication adds an even greater stimulant to this acting-out syndrome. The Boston Tea Party on December 16, 1773, could be called a "symbolic protest" which demonstrated dissatisfaction with the Tea Act of 1773.¹⁶ More recently, sit-in demonstrations to symbolize opposition to segregation practices have been approved by the Supreme Court as a proper exercise of first amendment freedoms.¹⁷ Other conduct performed under the pretense of symbolic speech such as pouring blood over draft records,¹⁸ wearing long hair in school,¹⁹ burning a draft card,²⁰ and nude dancing,²¹

¹² *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹³ *Edwards v. South Carolina*, 372 U.S. 229 (1963).

¹⁴ *Feiner v. New York*, 340 U.S. 315 (1951).

¹⁵ *Schenck v. United States*, 249 U.S. 47 (1918).

¹⁶ Americans may look back with pride on this revolutionary event but the British undoubtedly viewed it as a crime.

¹⁷ *Brown v. Louisiana*, 383 U.S. 131 (1966) public library; *Garner v. Louisiana*, 368 U.S. 157 (1961) lunch counter; *Taylor v. Louisiana*, 370 U.S. 154 (1962) bus depot waiting room.

¹⁸ *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970), a protest against the Vietnam conflict.

¹⁹ *Richards v. Thurston*, 304 F. Supp. 499 (D. Mass. 1969). In this case the student claimed his long hair indicated his association with the younger generation, expressing an independent, aesthetic and social outlook and the determination to reject many of the customs and values of the older generation. The various circuits are split as to whether school haircut regulations are a valid state function. For a summary of the opinions of the various circuits see *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).

²⁰ *United States v. O'Brien*, 391 U.S. 397 (1968).

²¹ *California v. LaRue*, 404 U.S. 999 (1972); *Paladino v. City of Omaha*, 335 F. Supp. 897 (D. Neb. 1972); *Hodges v. Fitle*, 332 F. Supp. 504 (D. Neb. 1971).

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has been held not to be within the protection of the first amendment.

In *Tinker v. Des Moines Community School District*,²² the Supreme Court attached the protection of the first amendment to certain conduct because it was closely "akin to pure speech." In *Tinker*, a group of adults, students, and non-students decided to publicize their objection to the hostilities in Vietnam and their support for a truce by wearing black armbands during the Christmas holiday season and fasting on December 16th and New Year's Eve. The Tinker family, which included three school age children, decided to participate in the program. The various principals of the Des Moines school system, having learned of this planned demonstration, adopted a policy of asking any participating student to remove the arm band — if the student refused he was suspended until he was willing to comply. The policy did not extend, however, to students wearing other types of political buttons or symbols. The Tinker children were suspended and did not return to school until after the planned period for wearing the armbands had passed.

The Supreme Court held that this conduct was "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."²³ In its ruling the Court noted that wearing these armbands did not involve "aggressive, disruptive action or even group demonstrations."²⁴

The holding of *Tinker* is that conduct which is closely "akin to pure speech" is to be afforded protection under the first amendment. The Court recognized that certain conduct may be prohibited, but the state must be able to show that its actions were caused by something more than a mere desire to avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint."²⁵ Mr. Justice White, in a concurring opinion, pointed out that it is appropriate to note "the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest . . ."²⁶ Before prohibiting conduct, the state

²² 393 U.S. 503 (1969).

²³ *Id.* at 505.

²⁴ *Id.* at 508. Mr. Justice Black, in a dissenting opinion, would have affirmed the action of the school authorities. He noted there was evidence of minimal disruptions from time to time and at one point an older football player had to step in to stop the ridicule which was being placed on the Tinker children. Also, a mathematics teacher testified his class was "wrecked" by disputes with Mary Beth Tinker.

²⁵ *Id.* at 509.

²⁶ *Id.* at 515.

must consider whether the conduct is so intertwined with speech that it is closely "akin to pure speech" and thus afforded greater protection.

The first amendment has been extended to protect certain nonverbal conduct of a communicative nature, but the communication of ideas by conduct has not been given the same degree of protection accorded the communication of ideas by *pure speech*. The rationale of this distinction was aptly set forth by Judge MacKinnon when, in discussing the constitutionality of the federal flag desecration statute, he stated:

The difference in treatment afforded speech as distinguished from physical acts is, in part, a recognition of the fact that there are certain fundamental differences between the two. Speech is the traditional instrument of peaceful persuasion, the means traditionally used to convert people to a different point of view and, as such is the very lifeblood of any free democracy.

. . . .

Physical acts, however, differ from pure speech. While speech invites discussion, counter speech and eventual agreement, public acts often have a certain finality about them which is frequently so conclusory and provocative as to be destructive of that rational discourse which we consider to be so essential to the continuing vitality of the Nation. Of course, speech can also be provocative but it provokes a response in kind rather than those which tend to fill the marketplace of ideas with the sound of thudding fists.²⁷

The Supreme Court, prior to *Tinker*, had stated that "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."²⁸ It is important to view the expression in the context of the action when determining whether a form of expression is speech or conduct. In some instances, conduct shall be treated as symbolic speech, but if this form of speech is abused as to incite violence, to commit a crime, or to produce a result which is harmful to the health and well-being of the community it should be treated as conduct and punished accordingly. Thus, when a student in a southern high school wished to express his support for the "ideals" of the Confederacy by wearing a Confederate flag on his jacket, his exercise of free expression was limited, lest his right of free expression override the more important societal interest of operating an integrated school free from riots.²⁹ The Constitutional guarantee

²⁷ *Joyce v. United States*, 454 F.2d 971, 987-988 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972).

²⁸ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

²⁹ *Melton v. Young*, 328 F. Supp. 88 (E.D. Tenn. 1971).

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goes to the substance rather than the form of the communication. If the substantive content of any form of expression threatens the public health, safety or well being, the first amendment freedoms will be subordinated to the public interest.³⁰

The flag of the United States can be used in a variety of ways that are protected by the first amendment because it is akin to pure speech. One example is the American hitch-hiker in Europe who sews "Old Glory" to the back of his pack in an attempt to attract the attention of American drivers on the highway. Nothing is said, but by giving this signal the hitchhiker is saying, "How about giving me a lift? I am a fellow countryman."

Flying the flag at half-mast in mourning or to the left of the United Nations flag to symbolize subordination to the world body has been held to be protected symbolic speech.³¹ The flag salute is a "form of utterance," therefore, refusing to salute the flag is protected.³² One federal district court has stated that even the act of publicly burning the flag is symbolic speech because:

[S]uch conduct is invariably successful in communicating the idea. There is nothing equivocal about a flag-draped casket or a flag flying at half-mast at the death of a dignitary. Nor in this day and time is anyone likely to mistake the nature of the ideas expressed by a young person who desecrates his country's flag at an anti-war gathering.³³

The court did find, however, that there can be an overriding public interest in preventing this sort of conduct.³⁴

On the other hand, another federal district court rejected the view that whenever the flag is used, speech is involved:

The argument is based on a false premise: that what the flag stands for can be authoritatively stated, i.e., that it represents government and/or official policy. . . . we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.

The flag has never been a trademark of government. It is not "official" in the sense that its display is limited to the Army and the Navy or to public buildings or for state occasions. It no more belongs to the President than it does to the most private citizen. It may be flown, and often is, over the YMCA and the Jewish synagogue, the Peace Corps and the Army post, the American Federation of Labor and General Motors. It belongs as much to the defeated

³⁰ Taylor v. Louisiana, 370 U.S. 154 (1962).

³¹ Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

³² West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); Thomas v. Smith, 334 F. Supp. 1203 (D. Conn. 1971).

³³ Crosson v. Silver, 319 F. Supp. 1084, 1086 (D. Ariz. 1970).

³⁴ *Id.* at 1088.

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political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America—in all its marvelous diversity.³⁵

Over the past several years flag desecration cases have proliferated. Although most deal with political protest, others stem from the contemporary use of the flag as an object of fashion and high-camp. It is not unusual to see the flag on ski sweaters, shirts, hats, helmets, shopping bags, automobile bumpers, jackets, and pop posters. Often, the use of the flag is not in conjunction with any discernable set of beliefs. These new, informal usages are at variance with traditional flag etiquette and make it difficult to interpret the older flag laws which condemn contemptuous treatment of the flag without defining what is meant by contemptuous treatment.

Herein lies the problem. To what extent may the government preserve the dignity and prestige of our national symbol without compromising the right of free speech? In 1968 the Supreme Court decided *United States v. O'Brien*.³⁶ In *O'Brien*, the Supreme Court set forth the criteria under which the government may proscribe conduct even though the conduct contains some communicative elements. This article will now examine the *O'Brien* guidelines, their applicability to flag desecration statutes, and what special considerations, if any, are applicable to the individual serviceman.

II. O'BRIEN AND SYMBOLIC SPEECH

On March 31, 1967, on the steps of the South Boston Courthouse, David O'Brien and three companions burned their Selective Service registration certificates. Subsequently, the assembled crowd began attacking the four men and an agent of the Federal Bureau of Investigation, who had witnessed the entire chain of events, led O'Brien to safety inside the courthouse. O'Brien was subsequently indicted for willfully and knowingly mutilating, destroying, and changing by burning his registration certificate in violation of federal law.³⁷ At his trial, O'Brien testified that he burned his certificate in an attempt to influence others to adopt his anti-war beliefs and to cause them to reevaluate their positions concerning the Selective Service, the armed forces, and

³⁵ *Parker v. Morgan*, 322 F. Supp. 585, 588 (W.D. N.C. 1971).

³⁶ 391 U.S. 367 (1968).

³⁷ 50 App. U.S.C. §462(b) (1967).

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their place in our present culture. O'Brien argued the statute was unconstitutional because it abridged his right of free speech. The district court rejected this argument, but the Court of Appeals for the First Circuit adopted O'Brien's position.³⁸ The court of appeals reasoned that an existing regulation of the Selective Service System required registrants to keep their certificates in their personal possession at all times, and since this regulation was made criminal by statute, the statute under which O'Brien was tried served no valid purpose. Furthermore, the court concluded, the act ran afoul of the first amendment by singling out persons engaged in protests because the act was directed at public, as distinguished from private, destruction.

Before the Supreme Court, O'Brien submitted that the act of burning his registration certificate was *symbolic speech* protected by the first amendment. He argued that freedom of expression included "all modes of 'communication of ideas by conduct,' and that his conduct [was] within this definition because he did it in 'demonstration against the war and against the draft.'"³⁹ The Court, Mr. Chief Justice Warren speaking for the majority, rejected O'Brien's arguments.

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁴⁰

The Court adopted a rule that allows the regulation of conduct — the nonspeech element — even if there are incidental limitations on first amendment freedoms if there is an important govern-

³⁸ O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967).

³⁹ United States v. O'Brien, 391 U.S. 367, 376 (1968).

⁴⁰ *Id.* at 376.

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mental interest involved. Thus, while the State may only prohibit pure speech if there is a "clear and present danger" of evil which the State may protect against, regulation of symbolic speech involves a balancing test. The social interest to be served by prohibiting and regulating conduct must be balanced against freedom of expression. Let us now consider the specific criteria as set forth in *O'Brien* which must exist before communicative conduct may be prohibited.

A. "IF IT IS WITHIN THE CONSTITUTIONAL POWER OF THE GOVERNMENT."

In *O'Brien*, the Court found constitutional support for the Universal Military Training and Service Act in Congress' power to raise and support armies and make all laws necessary and proper to that end.

The Constitution contains no specific mention of adopting a national flag or symbol. Article I, Section 8, provides that Congress shall have the power "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Not all the powers of the federal government are enumerated, additional powers not enunciated do exist. One of these additional powers is the "sovereign power" including those powers which are the "natural and necessary concomitants of nationality."⁴¹

It is not unreasonable to conclude that the "necessary and proper clause" includes the power to legislate upon the subject of and the adoption of a national flag. Chief Justice Marshall declared that the implied powers encompass "all [legislative] means which are appropriate"⁴² to carry out the legitimate ends of the Constitution unless forbidden by the letter and spirit of the Constitution.

The framers of the Constitution were aware that all countries adopt a banner in their early stages. Such a banner has a great psychological impact upon those individuals who are called upon to serve the cause of the nation. The Continental Congress, less

⁴¹ *United States v. Ferguson*, 302 F. Supp. 1111, 1114 (W.D. Mo. 1969); *accord*, *United States v. Crosson*, 462 F.2d 96 (9th Cir. 1972); *Joyce v. United States*, 454 F.2d 971 (D. C. Cir. 1971).

⁴² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

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than one year after asserting our nation's independence, provided that "the flag of the United States shall be thirteen stripes, alternating red and white, that the Union be thirteen stars, white in a blue field, representing a new Constellation."⁴³ This design has remained unaltered for 196 years except for the addition of a new star to mark the admission of each new state.

If it is within the power of Congress to adopt a national flag, it must be concluded that Congress possesses the concomitant power to regulate conduct with respect to the flag and to protect it from "contemptuous destruction."⁴⁴

B. "IF IT FURTHERS AN IMPORTANT OR SUBSTANTIAL GOVERNMENTAL INTEREST."

It should be noted that flag desecration statutes have been adopted by each of the fifty states and by the federal government. These statutes may be divided into two basic categories. The majority of state flag desecration statutes fall into the first category and with minor variations, track the Uniform Flag Act⁴⁵ which provides:

No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon [a flag of the United States.]⁴⁶

The Uniform Flag Act defines the flag of the United States as any flag, picture, or representation made of any substance purporting to be a flag of the United States.⁴⁷ The second category contains the statute passed by Congress in 1968 which provides for the punishment of:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it. . . .⁴⁸

This statute defines flag in language similar to the Uniform Flag Act but expands the definition to include representations which show the colors, the stars and the stripes, in any number

⁴³ 8 JOURNAL OF THE CONTINENTAL CONGRESS 464.

⁴⁴ *United States v. Ferguson*, 302 F. Supp. 1111, 1114 (W.D. Mo. 1969); *accord*, *Halter v. Nebraska*, 205 U.S. 34 (1907); *United States v. Crosson*, 462 F.2d 96 (9th Cir. 1972); *Hoffman v. United States*, 445 F.2d 226 (D.C. Cir. 1971); *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971); *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971); *Sutherland v. DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971).

⁴⁵ UNIFORM FLAG ACT, §3, 9B U.L.A. 51 (1966).

⁴⁶ UNIFORM FLAG ACT, §3, 9B U.L.A. at 52 (1966).

⁴⁷ *Id.* §1.

⁴⁸ Desecration of the Flag of the United States, 18 U.S.C. §700(a) (1970).

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thereof, or any part which the average person "seeing the same without deliberation may believe the same to represent the flag . . . of the United States of America."⁴⁹

In *Street v. New York*,⁵⁰ the Supreme Court reviewed a conviction under a state statute which, like the Uniform Flag Act, prohibited casting contempt upon the flag by either *words or act*. The evidence revealed that when Street heard about the shooting of James Meredith in Mississippi, he became disgusted and angry. In his anger Street took his neatly folded 48 star flag to a nearby intersection and burned it.⁵¹ While the flag was burning a crowd gathered and Street was heard to say, "[i]f they did that to Meredith, we don't need any American flag."⁵² The evidence was unclear as to whether Street said the word "damn" several times. The Supreme Court reversed the conviction because the record did not reveal whether the conviction was based upon Street's spoken words or his conduct. If the conviction was for the spoken communication, the Court stated that Street's oratory was protected by the first amendment. The Court discussed four governmental interests which might be furthered by punishing Street for his *words*. These same interests are applicable when discussing the governmental interests which might be furthered by punishing someone for desecration of the flag — for his communicative conduct.

The first interest discussed by the Court was the interest the state may have in deterring a person from vocally inciting others to commit unlawful acts. In *Street*, the Court felt that the defendant's words did not urge anyone to do anything unlawful. All Street did was publicly advocate his idea that the United States should abandon its national symbol. Thus, the fourteenth and first amendments nullified any state effort to prohibit his public advocacy of a peaceful change in an existing institution. This state interest has little application to flag desecration statutes.

The fourth state interest discussed by the Court is equally inapplicable to flag desecration cases, the interest of the state to protect the sensibilities of passers-by who might be shocked by the words spoken about the American flag. The Supreme Court noted

⁴⁹ *Id.* §700(b) (1970).

⁵⁰ 394 U.S. 576 (1969).

⁵¹ It should be noted that at the time of trial the flag of the United States consisted of 50 stars.

⁵² *Street v. New York*, 394 U.S. 576, 579 (1969).

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that the evidence indicated that Street may have said the word "damn" a few times, but found there was no emphasis on this at the trial and any shock effect would have to be attributed to the content of the ideas expressed. "It is firmly settled," stated the Court, "that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."⁵³ This rule applies with equal force to a state's interest in preventing flag desecration.

Addressing the third governmental interest—that Street show the proper respect for our national emblem—the Court said:

[The] conviction could not be supported on the theory that by making the above-quoted remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen. In *Board of Education v. Barnette* . . . this Court held that to require unwilling school children to salute the flag would violate rights of free expression assured by the Fourteenth Amendment.⁵⁴

It is important to remember the Court was addressing itself to Street's conviction for his spoken words, not his conduct of burning the flag, and this language of the Court may not be valid when applied to contemptuous conduct rather than disrespect spoken about the flag.

In 1940 the Court had sustained the power of the state to require school children to salute the flag as an appropriate means of fostering "patriotic impulses," "an attachment to the institutions of their country," and "national unity [which] is the basis of national security."⁵⁵

By 1943, however, the viewpoint of the Court had changed. In *West Virginia Board of Education v. Barnette*,⁵⁶ school children of the Jehovah's Witness faith refused to salute the flag of the United States and to recite the Pledge of Allegiance. The Court found the flag salute to be a form of utterance because it required an affirmation of a belief and an attitude of mind. Thus, the state was compelling its students to declare a belief. The Court did not dispute that unity is an end which officials may foster by persuasion and example. It did question, however, whether compulsion such as employed in this case, was a permissible method of achieving the result. As to the necessity of fostering patriotism, the Court said, "to believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory

⁵³ *Id.* at 592.

⁵⁴ *Id.* at 593.

⁵⁵ *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 595 (1940).

⁵⁶ 319 U.S. 624 (1943).

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routine is to make an unflattering estimate of the appeal of our institutions to free minds." ⁵⁷ The Court reiterated its concern about the division of American society which would result from the necessity of choosing what doctrine and whose program public education officials should compel youth to unite in embracing. The Court said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.⁵⁸

After a careful analysis of *Barnette*, the Court in *Street* dismissed the state's interest in ensuring proper respect for the integrity of the flag by saying:

We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinion about the flag, including those opinions which are defiant or contemptuous.⁵⁹

In *United States v. Crosson*,⁶⁰ Circuit Judge Browning of the ninth circuit dissented in a case involving a conviction for contemptuously burning the flag in violation of the federal statute, stating that *Barnette* stood for the proposition that the first amendment prevents the government from arguing that it has a legitimate interest in compelling an individual to express respect for the flag and what it symbolizes. Justice Browning argued that, since the national interest in patriotism, loyalty, and unity does not warrant censorship of disrespectful views directed against the government, these same national interests can hardly justify censorship when adverse views are directed against the mere symbol of government.

It appears, however, that the general weight of authority is that patriotism and national unity are a proper goal of flag desecration statutes. *Street* was decided on the issue of words spoken about the flag, not the act of physical destruction on a public street corner. *Barnette* dealt with children refusing to salute the flag—the children's failure to do an affirmative act required by the school system but contrary to their religious beliefs. Flag desecration statutes, on the other hand, do not require anyone to

⁵⁷ *Id.* at 642.

⁵⁸ *Id.* at 642.

⁵⁹ *Street v. New York*, 394 U.S. 576, 595 (1969).

⁶⁰ 462 F.2d 96 (9th Cir. 1972).

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do anything. These statutes merely prohibit certain destructive contemptuous conduct.

In 1907 the Supreme Court held that a state statute that prohibited the placing of a representation of the flag on anything for the purpose of advertisement was constitutional.⁶¹ Mr. Justice Fortas, cited this 1907 case when he dissented in *Street*:

Statutes prescribe how the flag may be displayed; how it may lawfully be disposed of; when, how, and for what purposes it may and may not be used. . . . A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly, as *Halter v. Nebraska*, . . . held, these special conditions are not per se arbitrary or beyond governmental power under our Constitution.⁶²

The concern of Congress with the flag's place in the nation is demonstrated by legislation designating Flag Day,⁶³ National Flag Week,⁶⁴ numerous holidays on which the flag should be displayed,⁶⁵ as well as in specific federal legislation setting forth patriotic customs on how the flag should be treated.⁶⁶

In recent years many federal courts have recognized the interest the state has in creating and maintaining patriotism through its flag desecration statutes. In *Goguen v. Smith*⁶⁷ the constitutionality of the Massachusetts flag desecration statute was at issue. After discussing the state's interest in preventing a breach of the peace the district court stated:

A broader, and I think, more pertinent ground for flag legislation is to be found in the state's interest in preventing the desecration of our symbol of national unity. The flag reflects the common ideal which binds us together. It stands for no particular ideology other than the general loyalty and patriotism of all citizens. That loyalty and patriotism may be expressed in dissent as well as in agreement with the majority. To require one not to mutilate or defile the flag is merely to require him to refrain from physically insulting a symbol venerated by the vast majority of his countrymen. The state may exercise some degree of control over shocking conduct, at least

⁶¹ *Halter v. Nebraska*, 205 U.S. 34 (1907).

⁶² *Street v. New York*, 394 U.S. 576, 617 (1969). Mr. Justice Fortas would have affirmed the conviction since the evidence was clear that Street was convicted for his conduct, not his spoken words. Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice White also would have affirmed the conviction. All four dissenters stated their opinion that the statute was constitutional. See note 105, *infra*.

⁶³ 36 U.S.C. §157 (1970).

⁶⁴ *Id.*

⁶⁵ 36 U.S.C. §9 (1970).

⁶⁶ 36 U.S.C. §176 (1970).

⁶⁷ 343 F. Supp. 161 (D. Mass. 1972). *aff'd*, 471 F.2d 88 (1st Cir. 1972). *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974).

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where the "shock effect" stems from physical acts remote from the articulation of ideas.⁶⁸

A patriot loves his country, but what constitutes a patriotic act is a matter of opinion dependent upon the views of the individual. Many people believe that any conduct concerning the flag, not in strict conformity with traditional patriotic customs, is disloyal. Other people may believe that an individual is faithful to the truest principles of the American dream when he scrawls across the flag the words, "Make Love, Not War."

That it may be difficult to discern what is "patriotic" conduct does not mean that encouraging patriotism is not a legitimate state interest when applying the *O'Brien* formula. *Barnette* correctly held the government has no legitimate interest in requiring reverence to the flag or in establishing orthodox conduct concerning the flag, but to say the government has no legitimate interest in preventing its citizens from physically destroying a symbol which is revered by so many other citizens is reading *Barnette* too broadly. Having considered this distinction, the legislative reports on the federal flag desecration statute make it clear that the bill "does not prescribe orthodox conduct or require affirmative action."⁶⁹

There is a constant danger of public disruptions where the flag is publicly subjected to contemptuous, destructive acts. The state has an interest in preserving the peace and may legislate toward this end. This brings us to the last legislative interest the Court discussed in *Street*—an interest in preventing conduct which is so inflammatory that it would provoke others to retaliate physically against the actor.

In *Street* the accused burned the flag on a busy street corner immediately following the shooting of James Meredith. These were days of great civil unrest and conflicts between black and white were not uncommon. By his actions *Street* drew a crowd, and police officers testified that even though the crowd did not get unruly, they were concerned about possible violence. In *O'Brien*, an FBI agent had to rescue *O'Brien* from the attacking crowd. This contrasts with the situation described by the Court in *Tinker* where the Court noted the conduct did not involve aggressive or disruptive behavior. Few would argue with the proposition that the state has a right to protect itself from violent confrontations and may legislate to this end.

⁶⁸ *Id.* at 165.

⁶⁹ H. R. REP. 350, 90th Cong., 1st Sess. 4 (1967); S. REP. 1287, 90th Cong., 1st Sess. 3 (1968).

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When conduct is restricted or prohibited, the test to be applied is whether the regulation is reasonable, taking into account the first amendment requirements. Burning your house to protest high real estate taxes certainly contains significant nonspeech elements. Throwing bricks through the Post Office window to protest the slowness of the mail may have some communicative elements. Burning an automobile on the public thoroughfare in protest against pollution may contain speech and nonspeech elements. Conduct, unlike *pure speech*, must be subjected to reasonable regulations that take into account the competing interests involved. The state has a substantial governmental interest in the health, safety, and welfare of its people, thus it is able to prohibit the conduct set out above because of its nonspeech elements, even though the first amendment may have been brought into play. It appears that setting fire to a flag on a public thoroughfare or at a mass gathering contains noncommunicative elements which justify state action proscribing the conduct.

In *Barnette* the Court noted that the conduct of the students was peaceful and orderly. In *Street* the Court held the New York statute unconstitutional because it proscribed casting contempt on the flag by *words* as well as acts. In *People v. Radich*⁷⁰ the Court had an opportunity to review once again the New York statute but this time dealing solely with allegedly contemptuous acts. In *Radich*, a New York art dealer had for sale in his private gallery certain sculptures which used the flag of the United States as an integral part. A particularly offensive sculpture had the flag wrapped around a penis which was protruding from the top of a cross. The New York Court of Appeals upheld the statute's validity because it was designed to prevent an outbreak of violence by discouraging contemptuous and insulting treatment of the flag in public. Under the facts of this case, where wide public attention was drawn to the sculptures by placing one in a street display window, there was a danger of public disorder. The Supreme Court affirmed the conviction by an equally divided vote.

That the desecration or mutilation of the United States flag by burning or trampling upon it in public is an act that has a high likelihood of causing a breach of the peace is not in dispute. Many Americans have a deeply held emotional zeal concerning their reverence of the flag. Public acts of desecration are fraught with the danger of breaking the public peace. The state does have an interest in maintaining the public peace and may proscribe certain

⁷⁰ 26 N.Y. 2d 114, 308 N.Y.S. 2d 846, 257 N.E. 2d 30 (1970).

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conduct concerning the use of the flag. But, in doing so, the state must draft its legislation with sufficient specificity to prohibit only that conduct which would cause a breach of the peace. Many state statutes that were not adequately drafted have been held unconstitutional because they impaired first amendment freedoms when the public order was not threatened.⁷¹ Under this rationale, private desecration of the flag is not a proper subject of such legislation.

On the other hand, the state does have sufficient interest to justify a narrowly drawn statute which prohibits mutilation, desecration, and other physical damage to the flag.⁷² The federal flag desecration statute is directed only at "public" mutilation, defacement, defilement, burning, and trampling.⁷³ Since the statute is only applicable to public acts of physical mutilation, it is directed at acts in which there is a legitimate governmental interest and thus falls within the ambit of the second criterion of *O'Brien*.

C. "IF THE GOVERNMENTAL INTEREST IS UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION."

The Court in *O'Brien* said the governmental interest and the scope of the Act were limited to preserving the smooth and efficient functioning of the Selective Service System, and when *O'Brien* destroyed his registration certificate, he frustrated this governmental interest. "A law prohibiting destruction of Selective Service certificates," said the Court, "no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of driver's licenses, or a tax law prohibiting the destruction of books and records."⁷⁴

Legislation that prohibits an individual from showing contempt for the flag by verbal epithets is prohibited by the first amendment.⁷⁵ Likewise, legislation which attempts to regulate the ex-

⁷¹ Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (2d Cir. 1970); Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970); Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970). See also Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974).

⁷² Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974); Sutherland v. DeWulf, 323 F. Supp. 740 (S.D. Ill. 1971); Radich v. New York, 26 N.Y. 2d 114, 308 N.Y.S. 2d 846, 257 N.E. 2d 30 (1970).

⁷³ 18 U.S.C. §700 (1970).

⁷⁴ United States v. O'Brien, 391 U.S. 367, 375 (1968).

⁷⁵ Street v. New York, 394 U.S. 576 (1969).

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pression of views by nonverbal means may run afoul of the first amendment.⁷⁶ A review of some of the non-flag desecration cases, discloses several indicia that the courts look for in determining whether the legislation is directed at the suppression of free expression or the protection of a legitimate government interest.

The Court in *O'Brien* said that since the legislation does "not distinguish between public and private destruction"⁷⁷ there is no evidence of the legislation being directed at the free expression of views.⁷⁸ The legislation, therefore, follows the legislative purpose—registrants shall have their registration certificates in their possession at all times.

The federal flag desecration statute, likewise, is drafted in such a manner as to make it unrelated to the suppression of ideas. The legislative purpose is to protect the flag and prevent breaches of the peace. Although the statute talks in terms of preserving the national symbol, the statute only punishes those public acts which create a danger of bringing about a breach of the peace. That the legislation does not punish private acts of destruction gives greater credence to the argument that it is directed at preventing a breach of the peace. As is stated in the Senate Report on the federal statute, "[t]he bill does not prohibit speech, the communication of ideas or political dissent or protest."⁷⁹

Another indication of whether a statute seeks to prohibit certain ideas is whether the proscribed conduct is in any way singled out for prosecution from other similar conduct. In *Tinker*, while the school prohibited the students from wearing black armbands to express opposition to the Vietnam conflict, it left untouched those students who wore buttons relating to national political campaigns and even those who "wore the Iron Cross, traditionally a symbol of Nazism."⁸⁰ As a result, the Court found discrimination by the school system as to which ideas may and may not be expressed.

*United States v. Crowthers*⁸¹ involved a violation of government regulations that prohibited "disturbances" and "leafletting" in the concourse of the Pentagon. In *Crowthers*, the defendants were participants in a "Mass for Peace." The Fourth Circuit Court of

⁷⁶ *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931).

⁷⁷ *United States v. O'Brien*, 391 U.S. 367, 375 (1968).

⁷⁸ *Id.* at 375.

⁷⁹ S. REP. 1287, 90th Cong., 1st Sess., 3 (1968).

⁸⁰ *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 510 (1969).

⁸¹ 456 F.2d 1074 (4th Cir. 1972).

Appeals found invalid the regulation which permitted public meetings in support of governmental policy and at the same time forbade meetings that were opposed to that policy. The government may not permit conduct that it believes is "patriotic" and prohibit conduct that it believes is "unpatriotic."

The federal flag desecration legislation, unlike the prohibitions in *Tinker* and *Crowthers*, does not differentiate between patriotic and unpatriotic conduct. Many state statutes, however, have been declared unconstitutionally overbroad because the statute left it to the local police to decide what flag uses are permissible.⁸²

A third factor to consider is how does the legislation affect the ability to communicate with others. *Stromberg v. California*⁸³ was a prosecution for a violation of the California statute that prohibited flying the red flag in symbolic opposition to organized government. The Court held the statute unconstitutional because it could be construed to include peaceful and orderly opposition to government within constitutional limits. The Court said that under these circumstances the conduct was an integral part of the communication itself and found that the state desired to prohibit the expression of an idea by prohibiting the conduct which was the only means available to make that expression. In *Anderson v. Vaughn*⁸⁴ the district court struck down a state statute that prohibited carrying or displaying a red flag which was calculated to or might incite people to, commit disorders or breaches of the law. The court found the public display of the flag a symbolic act which was performed solely for the purpose of communicating an idea.

The *Anderson* decision followed the principles Mr. Justice Harlan recognized in his concurring opinion in *O'Brien*:

I wish to make explicit my understanding that [the opinion of the Court] does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since *O'Brien* manifestly could have conveyed his message in many ways other than by burning his draft card.⁸⁵

The federal flag desecration statute does not prohibit the use of the flag in the peaceful expression of unpopular views. It merely

⁸² See discussion at p. 193 *et seq. infra*.

⁸³ 383 U.S. 359 (1931).

⁸⁴ 327 F. Supp. 101 (D. Conn. 1971).

⁸⁵ *United States v. O'Brien*, 391 U.S. 367, 388 (1968).

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proscribes certain acts, whether or not associated with any particular views, which may be popular or unpopular. The statute was enacted to prohibit a physical act, contemptuously burning the flag, not to suppress free speech. The statutory prohibitions do not prevent a speaker from reaching a significant audience because he may convey his message in many ways other than by burning the flag.⁸⁶ The legislation does no more than proscribe one method by which the speaker may convey his message to the audience. The statute is not directed at the substance of the communication, as was the statute in *Stromberg*, but at the method of communication.

The nude dancers case sets out another factor to be considered in determining whether a statute or regulation is connected to a legitimate governmental interest or is an attempt to prohibit free expression. In *Paladino v. City of Omaha*,⁸⁷ the court focused on whether or not the speech elements were merely incidental to the activity. The district court found that in nude dancing any speech or communicative element is incidental, if not purely accidental, to the activity and thus not afforded the protection of the first amendment. In reaching its decision, the court commented that the wearing of a shirt resembling a flag, is done not only for warmth and protection but also to communicate a preference for style, color, or political activity.⁸⁸ Thus, another test which may be applied is whether or not the speech elements are merely incidental to the activity; if so, they are not protected.

In cases involving symbolic expression, it is not the opinion in the mind of the actor which causes the breach of the peace; it is the nonspeech element, the physical destruction of the flag which brings the state interest into play. In *Crosson v. Silver*⁸⁹ the district court found that a state has an interest in preventing a breach of the peace; therefore, if the cause of that breach is flag desecration, it is not protected expression. If the cause is not protected, "it is clear that the state interest underlying the prohibition is not related to the suppression of free expression."⁹⁰

In *United States v. Crosson*⁹¹ Circuit Judge Browning attacked the federal flag desecration statute in his dissenting opinion. Judge

⁸⁶ *Sutherland v. DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971); *United States v. Ferguson*, 302 F. Supp. 1111 (W.D. Mo. 1969).

⁸⁷ 334 F. Supp. 897 (D. Neb. 1972).

⁸⁸ *Id.* citing *Hoffman v. United States*, 445 F.2d 226 (D.C. Cir. 1971).

⁸⁹ 319 F. Supp. 1084 (D. Ariz. 1970).

⁹⁰ *Id.* at 1088.

⁹¹ 462 F.2d 96 (9th Cir. 1972). It should be noted that Crosson was originally indicted in state court for publicly burning the flag in violation of

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Browning stated that *Barnette* held that the government has no legitimate interest in compelling an individual to express respect for the flag and what it symbolizes. He saw no distinction between compelling an expression of respect for the flag and preventing expressions of disrespect. *Stromberg*, he added, held that a statute which is aimed at suppressing communication cannot be sustained as a regulation of noncommunicative conduct. Flag burning is not inherently contemptuous,⁹² and the statute only prohibits flag burning which is contemptuous. Neither flag burning which is not communicative nor flag burning which expresses loyalty and respect is prohibited. Furthermore, flag desecration done privately is not prohibited. All these factors, he concluded, indicate that the government is only interested in suppression of the public display of defiance and contempt for the flag—the attitude of *contempt* is being punished. Since *contempt* is a state of mind, Judge Browning concluded that it is an expression of an idea which may not be abridged under the provisions of the first amendment.

This is the only judicial opinion which challenges the concept that the government may protect the flag against destruction. The argument, however, is based upon representations made by the government during the trial that the single interest sought to be protected by this legislation is "the preservation of the flag as a symbol of unity of national ideals and purpose."⁹³

If the words "preservation of the flag as a symbol" mean the legislative purpose was to establish certain orthodox conduct concerning the flag, it obviously flies in the face of the holding in *Barnette*. It is submitted, however, that preservation of the national emblem is not necessarily synonymous with requiring certain conduct such as the Court was addressing in *Barnette*. The legislative history of the federal statute makes it clear that it was the intent of Congress to preserve the national emblem and maintain the public peace. It is significant that the federal statute only prohibits public acts of contempt, a clear indication of a proper congressional intent.

In summary, it is submitted that the federal government's interest in preventing flag desecration is not related to the suppression

the Arizona statute. The statute was found to be unconstitutionally overbroad in *Crosson v. Silver*, 319 F. Supp. 1084 (D. Ariz. 1970). Subsequently she was tried in federal court under the federal flag desecration statute and her conviction was affirmed in the above cited case.

⁹² 36 U.S.C. §176(j) (1970). The Patriotic Customs statute recommends that the flag, when no longer a fitting emblem for display, be destroyed preferably by burning.

⁹³ *United States v. Crosson*, 464 F.2d 96 (9th Cir. 1972).

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sion of free speech. The statute does not prevent the expression of any ideas about the flag, the United States, or its government. It merely restricts the manner and place in which the speaker may communicate his ideas, and these restrictions are reasonable under the circumstances.

The fourth and final criteria to be applied from *O'Brien* indicates the Court recognizes that there will be circumstances in which restrictive legislation is not related to the suppression of free expression, and yet free communication will be affected.

D. "IF THE INCIDENTAL RESTRICTION ON ALLEGED FIRST AMENDMENT FREEDOMS IS NO GREATER THAN IS ESSENTIAL TO THE FURTHERANCE OF THAT INTEREST."

In *O'Brien* the Court stated:

[The Military Training Act] is an appropriately narrow means of protecting [the governmental] interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of *O'Brien's* act of burning his registration certificate frustrated the Government's interest, a sufficient government interest has been shown to justify *O'Brien's* conviction.⁹⁴

The right of free expression has never been an absolute right. Reasonable, nondiscriminatory regulations of time, place, and manner have been permitted. Another limitation is that permitted by the "clear and present danger" rule. The usual statement of law in this respect is that a limitation of free speech is permissible when it is justified by a clear public interest. Mr. Justice Holmes made the classic observation that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁹⁵ The Court has stated of the *O'Brien* criteria that "as the mode of expression moves from the printed page to the commission of public acts which themselves violate valid penal statutes, the scope of permissible state regulations significantly increases."⁹⁶

A statute is unconstitutionally overbroad if it "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweep within its ambit other activities" which are protected by the first amendment.⁹⁷ The rationale of this doc-

⁹⁴ *United States v. O'Brien*, 391 U.S. 367, 382 (1968).

⁹⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1918).

⁹⁶ *California v. La Rue*, 404 U.S. 999 (1972).

⁹⁷ *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

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trine is that the rights guaranteed by the first amendment are of utmost importance in a free society. That degree of importance is reflected in the rule that legislation which is "susceptible of sweeping and improper application" will be held unconstitutional.⁹⁸ The rule extends to those statutes which properly proscribe activities within a state's legislative jurisdiction but are also of possible application to constitutionally protected acts.

A criminal statute must be written in terms sufficiently clear so that individuals will have fair notice of what conduct is prohibited,⁹⁹ and that standard of clarity is high when first amendment rights are involved.¹⁰⁰ Thus, if it is difficult to ascertain what type of conduct is contemptuous or what constitutes a flag within the meaning of the statute, the statute may fall.

The older flag desecration statutes adopted by a majority of the states typically contain language which makes it a crime to cast *contempt* upon the flag or to *misuse* the flag in any way. The tendency of recent federal decisions concerning these laws has been to hold them overbroad because they improperly attempt to regulate verbal insults, insulting gestures, and breaches of traditional flag etiquette.¹⁰¹

To insure that a flag desecration statute is not overbroad, it must be aimed only at the interest the government has to protect. Thus, if the governmental interest is preserving the peace, the statute must be drawn so as not to cover other governmental interests. Furthermore, the statutory proscription must be aimed at the conduct, not the communication. It will be recalled that in *Stromberg* the state statute was aimed at the communication of ideas, unlike the federal statute which does not seek to prevent the communication of any idea. In *Joyce v. United States*¹⁰² the federal desecration statute was challenged. Joyce had been convicted of tearing a small American flag during the Inauguration of President Nixon in 1969. The court said:

[The] act is not aimed at the suppression of speech, and since it imposes only the smallest restraints on "communication," the fact that those who utilize the flag in a prohibited manner do so with the purpose of conveying a particular idea is irrelevant.¹⁰³

Likewise the District Court for the Western District of North Carolina held the North Carolina flag desecration statute overbroad but commented:

⁹⁸ N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

⁹⁹ Lanzetta v. New Jersey, 306 U.S. 451 (1939).

¹⁰⁰ Smith v. California, 361 U.S. 147 (1959).

¹⁰¹ Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd* 42 U.S.L.W. 4393 (U.S. March 25, 1974).

¹⁰² 454 F.2d 971, 990 (D.C. Cir. 1971), *cert. denied*, — U.S. —, 31 L.Ed. 2d 242 (1972).

¹⁰³ *Id.* at 990.

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To protect the flag, . . . from physical defilement does not require dissidents to affirm the wisdom of such legislation or prevent expressions of scorn and derision toward all such legislative taboos. Narrow flag protection does not seem to us to infringe too much on First Amendment freedoms where actual speech is not circumscribed.¹⁰⁴

Finally, when considering the *O'Brien* criteria and applying them to flag desecration cases, it is important to note the dissenting opinions in *Street*. In four separate opinions, the dissenters stated that they would have affirmed *Street's* conviction because, based upon the record, it was clear that the conviction was for the physical destruction of the flag on the New York street corner. Each dissenting Justice expressed his opinion that the government does have a legitimate interest in protecting the flag against contemptuous destruction.¹⁰⁵ The majority opinion took cognizance of these dissents when it stated:

¹⁰⁴ *Parker v. Morgan*, 322 F. Supp. 585, 592 (W.D. N.C. 1971).

¹⁰⁵ *Street v. New York*, 394 U.S. 576 (1969). Mr. Chief Justice Warren stated:

I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise. Since I am satisfied that the constitutionality of appellant's conduct should be resolved in this case and am convinced that this conduct can be criminally punished, I dissent. (at 605)

Mr. Justice Black, certainly not unknown for his opinions protecting first amendment rights, stated:

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against. (at 610)

Mr. Justice White stated:

For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction. I must dissent. (at 615)

Finally, the opinion of Mr. Justice Fortas:

If the national flag were nothing more than a chattel, subject only to the rules governing the use of private personality, its use would nevertheless be subject to certain types of state regulation. (at 615)

A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. (at 617)

Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest. (at 617)

[W]e reiterate that we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest.¹⁰⁶

Having considered the four criteria set forth in *O'Brien*, it is submitted that a properly drawn flag desecration statute can meet the constitutional requirements of the first amendment.

III. THE CHILLING EFFECT

In the past several years there have been numerous cases dealing with desecration of the flag. These cases involved the use of the flag as an art form, the unorthodox display of the flag, the use of the flag as an article of clothing, the writing of slogans across the flag, and actual physical destruction of the flag.

The federal flag desecration statute provides:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.¹⁰⁷

Somewhat dissimilar is the Uniform Flag Act, the model for most state statutes, which provides:

Mutilation.—No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.¹⁰⁸

These statutes are dissimilar in material respects. While the federal statute makes criminal only certain described publicly performed *acts*, the Uniform Flag Act attempts to criminally proscribe the use of contemptuous *words* against the flag. The Uniform Flag Act provisions embody two offenses; public treatment of the flag in certain ways and casting contempt upon the flag by *words* or *acts*. It is not surprising that state flag desecration statutes modelled after the Uniform Flag Act have been subject to judicial scrutiny under claims of first amendment violation.

In *Radich v. New York*¹⁰⁹ the New York Court of Appeals af-

¹⁰⁶ *Id.* at 594.

¹⁰⁷ 18 U.S.C. §700(a) (1970).

¹⁰⁸ UNIFORM FLAG ACT, §3, 9B U.L.A. 51 (1966).

¹⁰⁹ 26 N.Y. 2d 114, 308 N.Y.S. 2d 846, 257 N.E. 2d 30 (1970). For facts see text at p. 176 *supra*. LIFE published an article concerning various uses of the flag in modern art. Mar. 31, 1967, at 22.

firmed Radich's conviction, finding that a reasonable person would consider wrapping the flag around a phallic symbol as an act of dishonor. In a dissenting opinion Chief Justice Fuld, who wrote the majority opinion in *Street*, which was relied upon heavily by the majority in *Radich*, labeled this prosecution nothing more than "political censorship" of a 3-dimensional political cartoon which was in the best tradition of modern art, thus falling outside the purview of the decision in *Street*. Chief Justice Fuld drew a distinction between the potentially dangerous circumstances in *Street* and the innocuous, however distasteful, display of the flag in an art gallery. The Supreme Court affirmed.¹¹⁰

Use of the flag as an art form has fared better in other cases. When a University administration attempted to stop the publication of a school magazine because it depicted a burning flag on its cover, the United States District Court for Maryland said:

Here we have only expression in the form of art. The teachings of *Street* clearly require the protection of the expression attempted herein. The Maryland statute cannot constitutionally be applied to curtail freedom of expression as such.¹¹¹

When the flag was wrapped around an actor in the musical play *Hair*, the District Court for the Northern District of Georgia ruled that use of an American flag as a stage prop can in no way justify prior restraint of the performance of the play.¹¹² The court found that nonverbal expression is the element of the theater which distinguishes it from literature, and therefore it is a form of constitutionally protected expression.

These cases indicate that when the flag is used as an art form in a publication, as a prop in a play, and perhaps even as a sculpture, it is protected by the first amendment because the conduct is integral to the communication.¹¹³ This rule should apply with equal force to the popular "pop" posters which are readily available in stores and through mail order houses. *Radich* should be limited to the proposition that an art form may become so outrageously ob-

¹¹⁰ *Radich v. New York*, 401 U.S. 431 (1971). Mr. Justice Douglas took no part in the proceedings.

¹¹¹ *Korn v. Elkins*, 317 F. Supp. 138, 142 (D. Md. 1970).

¹¹² *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971). The court applied the holding of *Schacht v. United States*, 398 U.S. 58 (1970), in which the Supreme Court held that the prohibition against wearing a military uniform by nonmilitary personnel had no validity when the uniform was worn in a play.

¹¹³ *Stromberg v. California*, 283 U.S. 359 (1931), see also Justice Harlan's concurring opinion in *O'Brien*, quoted at page 185, *supra*.

scene that it no longer is entitled to the protections of the first amendment.

State laws that may proscribe making gestures to or at the flag, no matter how obscene or innocuous, on the basis of casting contempt on the flag have been struck down under the reasoning in *Street*.¹¹⁴ Although it is within the power of a legislature to proscribe the casting of contempt upon the flag, the proscriptive legislation must not encompass nonverbal conduct which may be labeled pure speech. Conduct such as sticking one's tongue out at the flag, turning one's thumbs down, raising a clenched fist salute, or making some other facial expression at the flag may not be prohibited. The reason is that these acts, "rather than provoke the average person to retaliate violently, . . . would likely merit no more than a scornful glance."¹¹⁵

The federal statute dealing with patriotic customs,¹¹⁶ as well as numerous state statutes, set forth in detail the manner of how, when, and where the flag of the United States shall be flown. The Delaware flag statute was held unconstitutional when there was a threat of prosecution for flying the United Nations flag in the position of honor on the right and the United States flag in the subordinate position on the left in a half-mast position. The court took judicial notice of the symbolic significance of flying the American flag and said:

[I]t is closely akin to "pure speech," and if a statute attempts to regulate it in furtherance of no interest other than suppression of expression, this court has no choice but to strike the statute down.¹¹⁷

Thus, the act of flying the flag, in an unorthodox or peculiar way is a symbolic act which may not be proscribed.

Wearing the flag as an article of clothing or as a decoration on clothing has, in recent years, become popular, not only with those who would oppose the government but also by those who believe the color combination of red, white and blue is attractive.

In *Goguen v. Smith*,¹¹⁸ the flag desecration statute was declared

¹¹⁴ *Parker v. Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971); *Crosson v. Silver*, 319 F. Supp. 1084 (D. Ariz. 1970). See also *Goguen v. Smith*, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974).

¹¹⁵ *Crosson v. Silver*, 319 F. Supp. 1084, 1089 (D. Ariz. 1970). In *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971) the court said, "Protection of the flag . . . is one thing. To go further and forbid expression of attitudes by a gesture or even facial expression is quite another" at 589.

¹¹⁶ 36 U.S.C. §§173-177 (1970).

¹¹⁷ *Hodsdon v. Buckson*, 310 F. Supp. 528, 533 (D. Del. 1970); *accord*, *Oldroyd v. Kugler*, 327 F. Supp. 176 (D. N.J. 1970).

¹¹⁸ *Goguen v. Smith*, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974).

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overbroad and vague when an individual was prosecuted for wearing a flag on his blue jeans in the vicinity of the left portion of his buttocks. The district court recognized that the state has a right to exercise some degree of control over shocking conduct when it stems from physical acts remote from the articulation of ideas, as well as a state right to protect the flag from physical mutilation, defacement, or burning. The court commented, however, that in these days when flags are commonly displayed on hats, garments, and vehicles the word "treats contemptuously" do not provide a readily ascertainable standard of prohibited conduct. The court said:

It is not clear, for instance, to what extent they prohibit any public deviation from formal flag etiquette—for example, a failure to remove one's hat when the flag passes. At least until recently, the unauthorized display of the flag on a jacket would have been regarded by many as contemptuous. Is such conduct today contemptuous within the meaning of the statute?

Is a flag worn on a shirt by a veteran permissible, but a flag worn upside down on a shirt by a yippie or a peace marcher contemptuous? Do the attitude and politics of the person wearing the flag determine whether its display is contemptuous? If so, would not the statute punish attitudes and views rather than specific conduct?

As worded, the statute sets "a net large enough to catch all possible offenders," leaving to the police and the courts to pick and choose whom to prosecute and convict.¹¹⁹

The court concluded the statute was so encompassing and vague that it violated the first amendment.

The United States District Court for the Northern District of Texas would not agree with the reasoning of the district court in *Goguen*. Texas has a statute which is titled, "Insult to the United States Flag."¹²⁰ In *Jones v. Wade*¹²¹ the accused had worn an army fatigue shirt with a flag sewn over the right breast pocket and fatigue trousers with small American flags sewn into the bottom of the legs. He was prosecuted "solely for the act of wearing the American flags or replicas thereof sewn into the bottom of the legs of his trousers."¹²² The district court found the Texas statute to be a valid exercise of the state's police power to preserve the dignity

¹¹⁹ *Id.* at 167.

¹²⁰ TEXAS PENAL CODE, Art. 152 (1952). The Texas statute protects the United States flag with great fervor. Although the Code is identical to the Uniform Flag Act it provides for a sentence of not less than two years nor more than twenty-five years confinement. The UNIFORM FLAG ACT, §5, 9B, U.L.A., on the other hand suggests the offense should only be a misdemeanor.

¹²¹ *Jones v. Wade*, 338 F. Supp. 441 (N.D. Tex. 1972).

¹²² *Id.* at 443.

of the flag and to prevent the violence which would naturally result from public indignities shown the national emblem.

The difficulty with a statute which proscribes wearing the flag as part of one's clothing is that it leaves interpretation to the individual caprice of the policeman. The policeman wearing a flag on his uniform, sees no illegal behavior when 200 members of the AFL-CIO march with flag decals on their hard hats during the 1972 Presidential Inauguration. He may, however, resent and arrest the long haired peace marcher who wears the flag upside down on the back of his jacket. The Ohio Court of Appeals found no difficulty in finding the flag desecrated when the accused wore it on the "seat of his trousers," "covering the human fundament," "extending over the anus," and over that part of the body which "universally and historically is considered unclean and the object of derision and scorn and the reference to which in a certain tenor is often the source of fighting words."¹²³ As an indication of how emotional this subject is, the trial court sentenced the accused to "banishment from [the] County for two years" in addition to confinement — the banishment was set aside on appeal.¹²⁴

Although it may be desirable to prevent the wearing of the flag on the seat of trousers, difficulties can immediately be seen in trying to regulate this type of conduct. If it is not desirable to prohibit the wearing of the flag in a traditional manner such as a small lapel pin, the state may have to allow the wearing of the flag in more unconventional places as well.

The wearing of an article of clothing which has been fashioned out of a flag, or simulates the pattern of the flag, is another area in which the courts are in apparent disagreement.

In *People v. Cowgill*¹²⁵ the flag was cut up and fashioned into a vest. The California court affirmed the conviction for flag desecration because the "constitutional guarantee of free speech covers the substances rather than the form of communication and the state may regulate the use of a particular form if it does so from a legitimate state interest."¹²⁶ The court found that the state had an interest in preventing this sort of conduct in order to prevent violence and maintain public order.

In October of 1968 Abbie Hoffman was called to testify before the House Committee on Un-American Activities. He showed up

¹²³ *State v. Kasnett*, 283 N.E. 2d 636, 639 (Ohio Ct. App. 1972).

¹²⁴ *State v. Kasnett*, 283 N.E. 2d 636, 639 (Ohio Ct. App. 1972).

¹²⁵ 274 Cal. App. 2d Supp. 923, 78 Cal. Rptr. 8531 (1969).

¹²⁶ *Id.* at 927.

wearing a shirt which was manufactured to resemble the flag of the United States. Pinned to the flag were two campaign buttons, one said, "Wallace for President, Stand Up For America" and the other, "Vote Pig Yippie in Sixty-Eight." When Hoffman was prosecuted under the federal flag desecration statute, the District of Columbia Circuit Court had little doubt Congress could protect the flag from desecration, but it found that Hoffman's conduct was not within the condemnation of the statute.¹²⁷ The court found that Congress intended only to condemn "physical dishonor or destruction" of the flag.¹²⁸ Wearing this shirt was not a contemptuous physical mutilation, defacement, or defilement as those words were used within the statute. In conjunction with this ruling it is important to note that although the court considered the shirt to come within the statutory definition of a flag "the plain fact is the shirt was not a flag of the United States. . . . We mention this problem because, when the injury is not to the flag itself but to a simulated design, it may well be that the proof of violation must be clearer than if the flag itself were desecrated."¹²⁹ It is interesting that the court made this comment even though it had already found that the statute's definition of contempt precluded a loose or expanded meaning. Yet, the statutory definition of what constitutes a "flag" was not so clear. Certainly the language of the court is inconsistent, and one can only conclude that the federal statute is somewhat vague.

Therefore, if an article of clothing is actually fashioned from a cut up flag, the wearer may be prosecuted, but if the article of clothing is merely manufactured with a flag design, it will not constitute desecration within the statute's wording without a clear showing of contemptuous conduct.

Another problem area was also touched upon in *Hoffman* — defacing the flag by placing buttons or slogans on it. One Court of Appeals has stated:

Writing the language, "I love this country" across the flag would "deface" it just as effectively as writing "I hate this country" upon the flag. . . . Of course, no "contempt" for the flag could be drawn from the use of the former.¹³⁰

In 1907 the Supreme Court held that a Nebraska statute which prohibited placing a representation of the flag on any item manu-

¹²⁷ *Hoffman v. United States*, 445 F.2d 226 (D.C. Cir. 1971).

¹²⁸ *Id.* at 229.

¹²⁹ *Id.* n. 9, at 229.

¹³⁰ *United States v. Crosson*, 462 F.2d 96, 100 (9th Cir. 1972).

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factured for resale for the purpose of advertising that item was a proper exercise of the state police power.¹³¹ The Nebraska statute was patterned after the Uniform Flag Act which provides:

Desecration.—No person shall, in any manner, for exhibition or display:

(a) place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag . . . of the United States. . . .

(b) expose to public view any such flag . . . ; or

(c) expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.¹³²

There is no comparable prohibition in the federal flag desecration statute, however, the Patriotic Customs statute does state:

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(i) The flag should never be used for advertising purposes in any manner whatsoever.¹³³

The patriotic customs statute, however, is not punitive and any prosecution must be under the more restrictive federal flag desecration statute. Although no cases since *Halter* have dealt with using the flag to advertise a product, there have been many prosecutions for placing a sign, slogan, or design upon the flag. The courts deciding these cases have examined the appropriate statute's purpose and have generally held that while a state may protect the flag from abuse, it may only do so in order to preserve the peace.¹³⁴

Thus a prosecution under the Arizona flag desecration statute was prevented because the statute was not directed toward a legitimate state interest. The Federal District Court of Arizona said a flag decal which has a peace sign superimposed is a symbolic expression of what the flag should stand for, and although it is defacing a representation of the flag "such an act is

¹³¹ *Halter v. Nebraska*, 205 U.S. 34 (1907). See page 179 *supra*. The Court expressed the opinion that using the flag for advertising purposes would tend to "degrade and cheapen it" in the estimation of the people.

¹³² UNIFORM FLAG ACT, §2, 9B U.L.A. (1966).

¹³³ 36 U.S.C. §176 (1970).

¹³⁴ *Thoms v. Smith*, 334 F. Supp. 1203 (D. Conn. 1971); *Crosson v. Silver*, 319 F. Supp. 1089 (D. Ariz. 1970).

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[not] likely to provoke the average citizen to angry retaliation." ¹³⁵

When the Connecticut statute prohibited, among other things, placing any word, design, device, symbol, or mark on the flag, it was struck down as overbroad as it did not prohibit only that conduct which might cause a breach of the peace. ¹³⁶ In this case the plaintiff sought to "publicly and peaceably deface the American flag, or . . . [display] a distorted image upon it." ¹³⁷ In holding the statute overbroad the United States District Court for Connecticut stated that although symbolic speech does not enjoy the comprehensive first amendment protections enjoyed by "pure speech," its restriction is justified only by a valid state interest — preservation of the public peace. The court stated, however, that not every public misuse of the American flag will incite unlawful acts or provoke retaliation.

The District Court for the Western District of North Carolina, in striking down the North Carolina flag desecration statute, hinted that writing the slogan "Give Peace a Chance" across the flag precluded the banner from being defined as a flag and there would be no defacement unless the conduct also cast contempt upon the flag. ¹³⁸ The court thus adopted a criterion similar to that enunciated by Circuit Judge MacKinnon in his concurring opinion in *Hoffman*.

Addressing himself to the fact that the shirt (flag) had been damaged by pinning two campaign buttons on it Judge MacKinnon stated "While a flag (or shirt) might be technically defaced by pinning such buttons thereon, such conduct alone does not cast contempt upon the flag." ¹³⁹ While this conduct may be a breach of patriotic customs, ¹⁴⁰ he reasoned, something more than a breach of custom is necessary to make the conduct criminal. This something more is proof the accused acted with "the requisite intent to knowingly cast contempt upon the flag." ¹⁴¹ Applying this test, Judge MacKinnon found ample evidence that Hoffman de-

¹³⁵ *Crosson v. Silver*, 319 F. Supp. 1089 (D. Ariz. 1970). The court found the Arizona statute to be overbroad.

¹³⁶ *Thoms v. Smith*, 334 F. Supp. 1203 (D. Conn. 1971).

¹³⁷ *Id.* at 1205.

¹³⁸ *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971). The court struck down the North Carolina statute as being overbroad.

¹³⁹ *Hoffman v. United States*, 445 F.2d 226, 230 (D.C. Cir. 1971).

¹⁴⁰ 36 U.S.C. §176(g) (1970). "The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature."

¹⁴¹ *Hoffman v. United States*, 445 F.2d 226, 230 (D.C. Cir. 1971).

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sired to cast contempt upon the Congressional Committee, but scant evidence to show he intended to cast contempt upon the flag.

Thus, it appears that not every act of placing a sign, slogan, or symbol upon the flag may be proscribed by legislation. Only those acts which have a tendency to cause a breach of the peace or support the conclusion that the actor intended to cast contempt upon the flag may be prohibited.

A similar problem is encountered when slogans, posters, and signs use the flag as an integral part of their design. The television news networks, with emphasis on visual communication, provide prime examples. 1972 was a Presidential election year, and in its election coverage the ABC television network used as a backdrop a large map of the United States which resembled the flag, except on the field of blue the stars were replaced by the numbers "72." CBS News, whenever discussing the peace negotiations in the Vietnam conflict, showed an outline of a dove consisting of the flags of the four adversaries.¹⁴² Likewise, when CBS News discussed the prisoners of war, it showed block letters "POW" with three strands of barbed wire across the bottom; the letters appeared to be cut from the United States flag. In all these instances "the average person seeing the same without deliberation [would] believe the same to represent the flag [of the United States]."¹⁴³ There is no doubt it was the intent of the designer and the networks that this should be so. Is this a defacing, defiling, or mutilating the flag within the terms of the statute?

The federal flag desecration statute defines flag to include the "colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either."¹⁴⁴ At what point do the colors of red, white, and blue become a flag which falls within the definition of the statute? A careful reading of the statute leaves one with the impression that the government has expropriated the colors of red, white, and blue. The District Court for the Western District of North Carolina thought this to be the case when it considered the North Carolina statute in *Parker v. Morgan*.¹⁴⁵ In *Morgan* the accused wore a jacket with an Ameri-

¹⁴² The United States flag was the wing of the dove.

¹⁴³ 18 U.S.C. §700(b) (1970). This language is taken from the statutory definition of "flag."

¹⁴⁴ *Id.*

¹⁴⁵ 322 F. Supp. 585 (W.D. N.C. 1971).

can flag sewn to the back and on the flag he had written, "Give Peace a Chance." Of the exhaustive statutory definition of flag the court said:

The definition of a flag in the North Carolina statute is simply unbelievable. It would doubtless embrace display of the Star of David against a red, white, and blue background. The statute makes plain that it matters not how many stripes or how many stars. One of each is enough. This is expropriation of color and design—not flag protection. Size is of no consequence and substance of no importance. It is even possible that the stars could be omitted entirely and the colors alone infringe the statute, for there is a disjunctive clause leaving it to the subjective determination of any person to believe, without deliberation, that a substance, or design may represent the flag of the United States. Read literally, it may be dangerous in North Carolina to possess anything red, white and blue. Such a definition is a manifest absurdity. Since it is not suggested that the state has the slightest interest in singling out from the spectrum certain colors for unique protection, this definition alone is sufficient to void the statute.¹⁴⁶

The court in *Hoffman*, it will be recalled, stated that although the shirt fit the statutory definition of flag it was not, in fact, a flag and under these circumstances the court must make an independent determination if the object is in fact a flag within the generic meaning of the term.

The New York statute defines a flag as anything purporting to be the flag of the United States upon which shall be shown the colors, the stars and the stripes, in any number. The Long Island Vietnam Moratorium Committee challenged the statute as being too broad because it threatened the distribution of their protest design on buttons and decals.¹⁴⁷ The design was a black circle containing the "peace symbol" with a red, white, and blue background which might have been perceived as a section of the American flag. The Second Circuit Court of Appeals had no difficulty in concluding that the design was a representation of the flag. The court stated that many types of flag usage and flag alteration constitute nonverbal expression and therefore are protected activities unless there is a vital state interest in proscribing the emblem. The New York statute, in the opinion of the court, was much too broad because it did not provide enforcement

¹⁴⁶ *Id.* at 588.

¹⁴⁷ In *Long Island Vietnam Moratorium Committee v. Cahn*, 322 F. Supp. (E.D. N.Y. 1970) the court refused to hold the statute unconstitutional overbroad because it did not believe the statute applied to the Committee's design and there was no reason to believe they would be prosecuted. This decision was reversed and the statute struck down in 437 F.2d 344 (2d Cir. 1970), *cert. denied*, 400 U.S. 956 (1970).

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officials with adequate guidance concerning what conduct is prohibited. The court remarked:

[The statute] prohibits in clear language a myriad of uses of the flag, including not only the displaying of the emblems which plaintiffs have been distributing, but also the displaying of flags or flag-type buttons with patriotic slogans or pictures on them. It prohibits on its face all kinds of posters, buttons, symbols, slogans, and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth. . . . The district attorney's broad reading of the subsection would make criminal the possession of all those reproductions of the face of President John F. Kennedy superimposed upon a picture of the American flag which hang on the walls of shops, homes and offices all over this country. And what of the millions of celluloid campaign buttons which for generations, including the time before this statute was enacted, have carried the photographs of the aspiring Presidential and other candidates against a background of one or more American flags in full color?¹⁴⁸

This same reasoning was also applied to a flag which had a peace symbol substituted for the stars in the blue field of the flag.¹⁴⁹

It is apparent from these cases that flag usage and alteration are afforded protection under the first amendment because these nonverbal communications are closely "akin to pure speech." The cases, however, generally, indicate that the line must be drawn at the point of "contemptuous physical contact"¹⁵⁰ and "physical dishonor or destruction"¹⁵¹ of the flag. The Senate Report on the federal flag desecration statute states that only "intentional, will-

¹⁴⁸ Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344, 348 (2d Cir. 1970), *cert. denied*, 400 U.S. 956 (1970).

¹⁴⁹ Gwathmey v. Town of East Hampton, 437 F.2d 351 (2d Cir. 1970).

¹⁵⁰ Parker v. Morgan, 322 F. Supp. 585, 590 (W.D. N.C. 1971). In this case the state prosecuted an individual who "for his own personal enjoyment and satisfaction, . . . without any purpose to communicate an idea, . . . had affixed a United States flag to the ceiling of his automobile and in the course of doing so had torn it about the edges and pierced it with fasteners." *Id.* at 587. The Patriotic Customs statute, 36 U.S.C. §175(b) (1970), provides, "The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat."; 36 U.S.C. §176(f) (1970) provides, "The flag should never be used as a covering for a ceiling."; and 36 U.S.C. §176(d) (1970) provides, "The flag should never be used as drapery of any sort whatsoever, . . ." These statutes, of course, are not penal. The Court in Parker, *supra*, expressed its opinion that the state does have a legitimate interest in preventing destruction of the flag but believed the North Carolina statute was much too broad to sustain a conviction on these facts.

¹⁵¹ Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974); *accord*, Hoffman v. United States, 445 F.2d 226 (D.C. Cir. 1971); Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970); Oldroyd v. Kugler, 327 F. Supp. 176 (D. N.J. 1970); People v. Cowgill, 274 Cal. App. 2d Supp. 923, 78 Cal. Rptr. 8531 (1969).

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ful . . . physical acts of desecration" are prohibited.¹⁵² "Specific examples of prohibited conduct," continues the report, "would include casting contempt upon the flag by burning or tearing it and by spitting upon or otherwise dirtying it."¹⁵³

During the Inauguration of President Nixon in 1969, Thomas Joyce participated in an anti-war demonstration across from the White House. During this demonstration he tore a small American flag, 3" X 5", which resulted in his subsequent conviction for violating the federal flag desecration statute.¹⁵⁴ The Court of Appeals for the District of Columbia said of the federal statute "[I]t is narrowly drawn to proscribe only those *physical acts* which may be considered to indicate an intention to cast 'contempt' upon the flag."¹⁵⁵

The final type of flag desecration to be discussed is the public burning of the flag. The federal statute dealing with patriotic customs provides "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."¹⁵⁶ A group of anti-war demonstrators burned the American flag at the University of Arizona on May 6, 1970; they were later prosecuted and convicted under the federal flag desecration statute.¹⁵⁷ The Court of Appeals for the Ninth Circuit found that a distinction existed between the type of burning which is recommended in the Patriotic Customs Statute and that burning which is proscribed. The distinction lies in the "purpose and the intent of the actor."¹⁵⁸ The flag may be destroyed by burning when it is "no longer a fitting emblem for display" and then only in a "dignified" way.¹⁵⁹ The flag desecration statute, however, proscribes casting "contempt" upon the flag by publicly burning it.

The Illinois flag desecration statute is identical to the Uniform Flag Act which, as we have seen, has been frequently struck down as overbroad when dealing with acts of flag alteration. But when the flag of the United States was burned in front of the Rock Island Post Office, the District Court for the Southern District of Illinois upheld the constitutionality of the state

¹⁵² S. Rep. 1987, 90th Cong., 1st Sess. 3 (1968).

¹⁵³ *Id.*

¹⁵⁴ *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, U.S. —, 31 L. Ed. 2d 242 (1971).

¹⁵⁵ *Id.* at 982 (emphasis added).

¹⁵⁶ 36 U.S.C. §176(j) (1970).

¹⁵⁷ *United States v. Crosson*, 462 F.2d 96, 109 (9th Cir. 1972).

¹⁵⁸ *Id.* at 100.

¹⁵⁹ 36 U.S.C. §176(j) (1970).

statute under which a state criminal prosecution of the defendants was pending.¹⁶⁰ The court benevolently assumed that there was a communicative element sufficient to bring the first amendment into play even though it was not clear to the court what was being expressed "if anything beyond disrespect, by their public burning of the flag."¹⁶¹ Even after making this assumption, however, the court found that flag burning was not protected because there are detrimental "nonspeech" elements involved. The act of burning the flag was compared to burning an automobile in front of the post office to protest air pollution.¹⁶² Although there may be some speech elements involved, the state has an interest in preventing this conduct because the noncommunicative elements may be adverse to the health, safety, and welfare of its citizens.

Most state statutes have fallen as being too broad because they define flag as almost anything using the colors of red, white, and blue, or they are vague in setting forth what sort of conduct is prohibited. Generally, the courts have upheld the statutes in instances of physical destruction of the flag, but the statutes are held vague and overbroad when they deal with displaying the flag, wearing the flag as a decoration, or altering the flag because they fall within "that murkey area where speech and attitudes are far more involved."¹⁶³

IV. FLAG DESECRATION AND THE MILITARY

Before exploring flag desecration and the military, let us examine the relationship between the military and freedom of speech. The United States was founded upon the principle of maximum individual liberty with a minimum of restrictions consistent with the needs of society. Prior to becoming part of the military community, however, the citizen is required to take an oath wherein he swears to "support and defend the Constitution of the United States" and to "bear true faith and allegiance to the same" ¹⁶⁴ The Supreme Court has stated "By enlistment the citizen becomes a soldier. His relation to the State and the public

¹⁶⁰ *Sutherland v. DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971).

¹⁶¹ *Id.* at 744.

¹⁶² *Id.*

¹⁶³ *Goguen v. Smith*, 343 F. Supp. 161 (D. Mass. 1972), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 42 U.S.L.W. 4393 (U.S. March 25, 1974).

¹⁶⁴ 10 U.S.C. §502 (1970).

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is changed. He acquires a new status with correlative rights and duties" ¹⁶⁵

As is true of his counterpart in the civilian community, the military member does not have an absolute right of free speech; there is, by necessity, an additional abridgment of the rights enjoyed by the civilian counterpart. The military, because of its mission, is a specialized community which must be governed by more absolute, as well as different, disciplines than those of the civilian community. Being a soldier is not only an occupation, it is a way of life. As the Court of Appeals for the Second Circuit has stated:

If [the soldier] asks: Does being in the Army curtail or suspend certain Constitutional rights?, the answer is unqualifiedly "yes." Of necessity, he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice and will ceases to exist. He acts at the command of some person—not a representative of his own choice—who gives commands to him which he does not like to obey. He is assigned to a squad and forced to associate with companions not of his selection and frequently the chores which he may be ordered to perform are of a most menial nature. Yet the armed services, their officers and their manner of discipline do serve an essential function in safeguarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty.¹⁶⁶

The former student who joins the United States Armed Forces soon learns that his training is in discipline and obedience. While a university may be a place for open and vigorous discussions and speeches, the military training base is not. The Supreme Court has stated:

An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, of the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.¹⁶⁷

Naturally the serviceman should not, and does not, surrender all of his rights when he puts on a uniform. Only those rights incompatible with the military mission are regulated and in measuring what rights may reasonably be denied the military's major purpose — to prepare itself for war and to wage it successfully — must be remembered. This purpose must be con-

¹⁶⁵ *In re Grimley*, 137 U.S. 157, 153 (1890).

¹⁶⁶ *Raderman v. Kaine*, 411 F.2d 1102, 1104 (2d Cir. 1969), cert. dismissed, 396 U.S. 976 (1969).

¹⁶⁷ *In re Grimley*, 137 U.S. 147, 153 (1890).

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sidered when weighing the conflicting interest between the right of the serviceman to express his views and the right of the Government to restrict his freedom of speech.

That a serviceman should be denied his right of free speech because of his employment is not an unusual principle. Even among civilian government employees the right to exercise first amendment freedoms may be circumscribed by the character of public employment or by the circumstances, place, and time where the right is sought to be exercised.¹⁶⁸

The Supreme Court has held that although the Hatch Act prohibits political activities by government employees, the statute does not violate their constitutional rights.¹⁶⁹ The courts have found many reasons which may justify curtailing political activities of public employees. Among those included are the following: promoting the efficiency and integrity of official duties; insuring that duty performance, not political action, earns advancement; preventing movement toward a one-party system by protecting employees from the political machine; and insuring that public officials are devoted to the public welfare and not political parties. These reasons apply equally to restricting the political activities of military personnel. In *Pickering v. Board of Education*¹⁷⁰ the Court said:

The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. . . . At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the . . . citizen . . . in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.¹⁷¹

Upon entering the armed forces, an individual is not subjected to an automatic abrogation of all constitutional right, ". . . mili-

¹⁶⁸ *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), *aff'd*, 429 F. 2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

¹⁶⁹ *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). In *National Assoc. of Letter Carriers v. U.S. Civil Service Commission*, 346 F. Supp. 578 (D. D.C. 1972), *rev'd*, 41 U.S.L.W. 5122 (1973), the court held the Hatch Act was vague and thus cannot stand. The court said, "The defect lies not in the basic underlying purpose to limit certain partisan political activities by federal employees but rather in its drafting. Prohibitions are worded in generalities that lack precision. There is no standard. No one can read the Act and ascertain what it prohibits." at 582.

¹⁷⁰ 391 U.S. 563 (1968).

¹⁷¹ *Id.* at 568.

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tary courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional right."¹⁷² With this mandate in mind the United States Court of Military Appeals has stated:

The right to free speech is not an indiscriminate right. Instead, it is qualified by the requirements of reasonableness in relation to time, place, and circumstances. . . . Thus, there is no doubt that restraints which reasonably protect the national interest do not violate the Constitutional right of free speech.¹⁷³

One common thread running through all the Supreme Court decisions concerning freedom of speech is the qualification that while freedom to think is absolute, the right to express thoughts, orally or in writing, at any time or any place, is not. In this regard, the rights of servicemen must be measured by a more refined rod than that used against his civilian counterpart. The Department of Army has specifically recognized these principles.

[W]e do not ask that every citizen or every soldier agree with every policy of the government. Indeed, the First Amendment to the Constitution requires that one be permitted to believe what he will. Nevertheless, the Government and our citizens are entitled to expect that, regardless of disagreement, every . . . soldier will obey the law of the land.¹⁷⁴

The Army in general and the Court of Military Appeals more particularly have recognized that although members of the armed forces have the right of free speech, it must be reconciled to the needs of the military.¹⁷⁵ It has been further provided that:

[T]he interest of the Government and the public in the maintenance of an effective and disciplined Army for the purpose of National defense justifies certain restraints upon the activities of military personnel which need not be imposed on similar activities by civilians.¹⁷⁶

Other Army Regulations provide that military personnel may register, vote, express personal opinions about candidates, contribute funds to political campaigns, and attend political meetings and rallies when not in uniform. They may not, however, use their

¹⁷² *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

¹⁷³ *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83, 95 (1954); *accord*, *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States v. Levy*, CM 416463, 39 C.M.R. 672 (1969); *United States v. Amick*, CM 418868, 40 C.M.R. 720 (1969).

¹⁷⁴ *Guidance on Dissent*, Department of the Army, Para. 3, 28 May 1969, AGAM-P(M), (27 May 1969) DCSPER-SARD.

¹⁷⁵ *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

¹⁷⁶ *Guidance on Dissent*, Department of the Army, Para. 4, 28 May 1969, AGAM-P(M), (27 May 1969) DCSPER-SARD.

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official authority to influence or interfere with an election, solicit votes, or require contributions from other military personnel.¹⁷⁷ These prohibitions are necessary to keep the military from becoming an overwhelming influence or coercive factor in local or national elections. Likewise, the participation in public demonstrations by military personnel is prohibited only when the demonstration takes place on a military reservation, in a foreign country or if the serviceman is in uniform.¹⁷⁸ This restriction is not intended to prohibit the expression of ideas but is an attempt to keep the armed forces neutral and to prevent the implication that the Army sanctions the particular cause. As can be seen from these two regulations the soldier may be active politically and may participate in social causes. The restrictions imposed are minimal and are intended as safeguards against the possible establishment of an overbearing military influence on the daily lives and activities of the civilian community. Regulations that are directed at maintaining the military as a neutral force and that do not dictate, direct, or influence local or national policy certainly are in keeping with the Constitution and not invalid because they may otherwise restrict free speech. If the military is going to act for, and carry out the orders of, the Government, regardless of which political party is in power, it is necessary that the military be politically neutral.

There are other times when military necessity dictates limitations on the constitutional freedoms of servicemen. Few people would dispute that censorship of news from the battlefield may be necessary for reasons of national security where "one false move could be extremely dangerous, and one false word could be disastrous, or even fatal."¹⁷⁹ Article 88, Uniform Code of Military Justice,¹⁸⁰ which punishes officers who use contemptuous words against the President, has been held valid even though it is a restriction on free speech because the Article seeks to avoid "the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief"¹⁸¹ The distribution of leaflets by military personnel may be curtailed when it constitutes a deliberate effort to promote

¹⁷⁷ Army Regulation 600-20, Para. 5-29 (28 April 1971).

¹⁷⁸ *Id.* at Para. 5-16.

¹⁷⁹ *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83, 105 (1954).

¹⁸⁰ 10 U.S.C. §888 (1970).

¹⁸¹ *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429, 437 (1967).

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disloyalty or disaffection among our soldiers.¹⁸² To insure against this danger the military may require a newspaper to be approved before it is distributed on post.¹⁸³ Likewise, it has been held proper to prohibit on-post meeting of soldiers who wished to discuss the justification of the United States engagement in Vietnam. The District Court for South Carolina stated:

To [these soldiers] the Vietnam war is an immoral war, engaged in wrongfully and carried on inhumanely. It must be assumed that a meeting, promoted by the plaintiffs could seek to develop and expound that thesis. Can it be disputed that such a meeting, held on post and directed particularly at servicemen being trained to participate in that very war, would likely be calculated to breed discontent and weaken loyalty among such servicemen? Can training for participation in a war be carried on simultaneously with lectures on the immorality or injustice of such war? In my opinion, the denial of the right for open public meetings at advertised meetings on-post for discussion of the propriety of the political decision to participate in the Vietnam war was justified "by reason of the peculiar circumstances of the military" and represented no infringement of the constitutional rights of the plaintiffs.

.....
They sought to generate, through their meeting, such discontent with the Vietnam war among servicemen that the political decision to involve this nation in such a war might be influenced, if not reversed. This they may have a constitutional right to do off base and as individual citizens, despite the fact that they are members of the armed services. But this is quite different from their right to organize on base among military men meetings to promote discontent with their military responsibilities and tasks.¹⁸⁴

Naturally, the need for discipline should not be the tool used to suppress first amendment rights solely because of an objection to the ideas expressed.¹⁸⁵ This power should only be used when there is a "clear danger to military loyalty, discipline or morale."¹⁸⁶

Having considered the nature of the military community and the necessity to have greater restrictions upon freedom of speech, we may now look to the *O'Brien* standards as they apply to flag desecration within the military service.

One governmental interest which the military has in preventing flag desecration is the same as that of the civilian community —

¹⁸² *United States v. Amick*, CM 418868, 40 C.M.R. 720 (1969).

¹⁸³ *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971); *Noland v. Irby*, 341 F. Supp. 818 (W.D. Ky. 1971).

¹⁸⁴ *Dash v. Commanding General*, 307 F. Supp. 849, 856-857 (D. S.C. 1969).

¹⁸⁵ *Cortright v. Resor*, 325 F. Supp. 797 (E.D. N.Y. 1971), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

¹⁸⁶ *Dash v. Commanding General*, 307 F. Supp. 849, 856 (D. S.C. 1969).

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to prevent a breach of the peace. If the civilian community has an interest in preventing a breach of the peace, the military interest is more compelling. Servicemen not only work together but must live together. It is not infrequent that the living and working conditions are under most undesirable circumstances. Under these circumstances, there is a greater danger of violence when the flag is treated contemptuously than in the civilian community.

A second governmental interest in preventing flag desecration is in preserving, building, and maintaining the loyalty, discipline, and morale of men called upon to serve the nation in time of war. It has been observed that:

An armed force which lacks loyalty, morale, or discipline or wherein is insubordination, disloyalty, mutiny or refusals to do their duty is far worse than no armed force at all and is positively an active menace to constituted government and the liberties of the people.¹⁸⁷

Judge Latimer, while serving on the United States Court of Military Appeals wrote:

At the heart of every successful military force are morale, discipline and public support of the cause. An army which lacks those cannot hope to succeed. . . . A wise policy, a fair sense of propriety, underlie morale and discipline. No man willingly lays down his life for a national cause which he is led to believe is unsound or unjust. . . . If morale and discipline are destroyed, our forces cannot be trained adequately, and the nation must necessarily fail in battle. A few dissident writers, occupying positions of importance in the military, could undermine the leadership of the armed forces; and if every member of the service was, during a time of conflict, or preparation therefore, permitted to ridicule, deride, deprecate, and destroy the character of those chosen to lead the armed forces, and the cause for which this country was fighting, then the war effort most assuredly fail.

. . . .
If it is necessary for survival that this country maintain a sizeable military establishment, . . . , then I have a great deal of difficulty in following an argument that those who serve should be entitled to express their views, even though by so doing they may destroy the spirit and morale of others which are vital to military preparedness and success. . . .

. . . .
A demoralized and undisciplined military service could cost us all those we possess, and hostility to prior restraints on communications should not be permitted to endanger our nation.¹⁸⁸

One way to build and maintain morale and loyalty is to preserve the dignity of the flag which represents the nation the soldier

¹⁸⁷ *Dunn v. United States*, 138 F.2d 137, 141 (8th Cir. 1943), *cert. denied*, 320 U.S. 314 (1943).

¹⁸⁸ *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83, 106-109 (1954).

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serves. Men in battle are often called upon to make sacrifices which may result in injury or death. Loyalty and respect for the flag that flies over that battlefield may provide an incentive to perform those acts so often required in battle. If servicemen, in the name of free speech, are able to treat the flag with contempt, it can only have an eroding effect on the morale and discipline of the men who may later be called to battle.

In *Barnette*, the Court said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception they do not occur to us.¹⁸⁹

This language is often quoted as the reason for holding flag desecration statutes invalid because they are aimed at an improper public interest — attempting to promote patriotism and respect for the flag by establishing certain conduct. Within the military context, however, the footnote following the above quote must be considered. The Court said:

The Nation may raise armies and compel citizens to give military service. . . . It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.¹⁹⁰

The Court with these words recognizes that there are times when the government may prescribe correct conduct concerning the flag. It has been held that military regulations requiring a soldier to salute his superior officers and the flag are not intended to interfere with religious liberties and thus do not violate the Constitution.¹⁹¹ Army Regulations that prescribe the exact conduct for each soldier, whether in uniform or not, during reveille, retreat, passing of the flag, or when the National Anthem is played are a proper exercise of military authority.¹⁹²

A third governmental interest is maintaining public confidence in the armed forces. In *United States v. Toomey*¹⁹³ an Air Force Regulation which prohibited wearing the uniform in a public demonstration was challenged because it restricted the airman's

¹⁸⁹ *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁹⁰ *Id.* n. 19, at 642.

¹⁹¹ *McCord v. Page*, 124 F. 2d 68 (5th Cir. 1941).

¹⁹² Army Regulation 600-25, Ch. 2, Appendix A (29 April 1971).

¹⁹³ 39 C.M.R. 969, 979 (AFBR 1968).

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right to free speech. In affirming the conviction the Air Force Court of Review stated:

Worn in these circumstances, the uniform would be likely to attract much more attention and attribute greater significance to the purpose of the demonstration than would otherwise be the case, and, additionally would amount to an overt and simultaneous protest against the military establishment by one of its members. We have no hesitancy in concluding that the wearing of the uniform under such service discrediting circumstances would not only be disruptive of morale and discipline in the armed forces but would directly and effectively tend to undermine the faith of the public in the military establishment and its personnel.¹⁹⁴

These words apply with equal force to flag desecration by military personnel. The sight of a serviceman treating the national emblem with contempt would certainly cast doubts in the mind of the public about the allegiance of the armed forces. The government not only has the right, but the obligation, to prevent this conduct from taking place.

Thus, it can be seen that within the military community there is a greater need to maintain the dignity of the flag than exists within the civilian community. This need stems from the military's unique nature and mission. Because of these differences, a military flag desecration regulation which is directed at contemptuous treatment of the flag, regardless of the place or manner in which the contempt is shown, would be valid if its purpose is to maintain troop morale, loyalty, and discipline. Such a regulation should be broad enough to encompass "contemptuous" display of the flag as well as physical mutilation or defacement by writing slogans or pictures upon the flag.¹⁹⁵ The gist of the offense is showing contempt for the flag by treating it as worthless, with disdain, or with scorn. Wearing the flag sewn to the back of a jacket or as a lapel pin may not be contemptuous and thus may not be prohibited. Wearing the flag as a patch on the seat of a pair of trousers certainly would have the effect of treating the flag as worthless. Such conduct should be prohibited. Since the gravamen of the offense would be treating the flag with contempt, such a regulation need not enumerate the different acts which are considered contemptuous and thus prohibited. The federal statute setting forth patriotic customs could provide guide-

¹⁹⁴ *Id.* at 974; *accord*, *United States v. Locks*, 40 C.M.R. 1022 (AFBR 1969).

¹⁹⁵ Army Regulation 840-10, Para. 106 (23 Aug. 1962). This paragraph states how the flag shall be displayed. Para. 106(b) also provides: "No lettering or object of any kind will be placed on the flag of the United States."

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lines as to what is and is not acceptable conduct concerning the flag.¹⁹⁶

The definition of flag should not be so all encompassing as to expropriate the colors of red, white, and blue. Likewise, there is no need to prohibit wearing articles of clothing which are manufactured with a flag design. It is submitted that the Uniform Flag Act defines flag in sufficiently narrow terms:

Definition. The words flag, standard, color, ensign, or shield, as used in this act shall include any flag, standard color, ensign, or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States . . . or a copy, picture or representation thereof.¹⁹⁷

Thus a design, symbol, poster, or button which incorporates the colors of red, white, and blue would not be a flag within this definition.

A military regulation which prohibits treating the flag with *contempt* would not prevent a soldier from expressing an idea; it would only be directed at the means by which he communicates his thoughts. The individual serviceman should not be prohibited from expressing verbally, at the appropriate time and place, his attitudes concerning the flag. There is no reason, however, why a member of the armed forces cannot be required to treat the flag with respect and afford it the dignity befitting an emblem which represents the nation he is sworn to defend.

V. CONCLUSION

The Uniform Flag Act, drafted in 1917 has subsequently been adopted, with minor variations, in all fifty states of the Union. In the latter part of the 1960's the flag became a vehicle to express opposition to American involvement in Vietnam. While the right of free speech under the first amendment had been recognized since the Republic was founded, it was not until 1969 that the Supreme Court held certain conduct to be *symbolic speech* which is protected by the first amendment.¹⁹⁸ In *O'Brien*¹⁹⁹ the Court set forth certain criteria which the government must satisfy before it may restrict conduct that has communicative elements. In *Street*²⁰⁰ the Court concluded that the only interest the state

¹⁹⁶ 36 U.S.C. §§172-176 (1970).

¹⁹⁷ UNIFORM FLAG ACT §1, 9B U.L.A. 51 (1966).

¹⁹⁸ *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969).

¹⁹⁹ 391 U.S. 367 (1968).

²⁰⁰ 394 U.S. 576 (1969).

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may have in preventing desecration of the flag is to maintain the peace. The Court dismissed any idea that the state may protect the flag because of a need to promote patriotism. The Court based its decision on *Barnette*²⁰¹ in which it held that no official shall prescribe what shall be orthodox conduct in matters of religion, politics, or nationality. *Barnette*, it must be remembered, however, did not deal with an act of flag desecration but rather with forcing school children to salute the flag contrary to their religious beliefs. *Barnette* may have been decided differently had these children torn the flag from its staff as an act of protest and defiance. The Court did recognize, however, an exception within the armed forces where certain orthodox conduct relating to flag treatment may be prescribed.

The governmental interest that most courts have accepted as determinative in the judicial examination of flag desecration statutes is maintaining the public peace. Such statutes must, however, be directed at situations in which there is a reasonable chance of a breach of the peace. For this reason, the federal statute prohibits public, but not private, flag desecration. In the military, there is an even greater interest in maintaining community tranquility. Since most servicemen have a deep love and respect for the flag, any conduct which demonstrates contempt for the flag may cause disorders within the unit.

Within the military there is another need to maintain respect for the flag. While an obscene gesture made toward the flag by a civilian may only receive "scornful glances," the same gesture by the man in uniform would tend to undermine the public confidence in the armed forces. The government has a right to require that servicemen conduct themselves in a manner befitting the uniform of the nation which he has sworn to defend.

For these reasons, conduct concerning the flag which may be acceptable within the civilian community cannot be tolerated when performed by a man in uniform. This does not mean that the serviceman cannot make a button, sign, poster, or decal for his automobile or room which use the colors of red, white, and blue. Nor should the serviceman be prohibited from displaying such manufactured posters or bumper stickers. This conduct should only be prohibited when the flag is actually cut up or altered to make the design. Under these guidelines a design which looks like a flag, such as placing a peace symbol in the field of blue, as a

²⁰¹ 319 U.S. 624 (1943).

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substitute for the stars, would be acceptable because as designed there is no flag of the United States. However, painting the peace symbol across the face of the flag would be prohibited because using the flag as a painting surface is to treat it contemptuously, that is, as worthless.

Although flag desecration statutes have been under attack, and many have been held unconstitutionally overbroad, no court has yet held that the government has no right to protect the flag against abuse. The courts which have held statutes invalid have done so because they are drawn in such a manner as to prohibit permissible conduct as well as impermissible conduct. Because of the "chilling effect" on protected activities, these statutes have been struck down.

The flag of the United States is gaining wide-spread attention by use of its colors and design on clothing, "pop" posters, and other socially relevant buttons and stickers. By such uses the public and the soldier alike gain a feeling that it is their flag and not necessarily the symbol of the establishment. Such innocent uses do not necessarily show contempt for the flag as they can equally be an expression of love of country and the flag which is its symbol. These feelings can only benefit the armed forces and the nation.

The United States was founded upon the principle of individual liberty. This liberty, however, carries with it certain ethical, moral, and political obligations. Liberty will not be preserved merely by extending individual rights and privileges. While the law must protect individual liberty, some of these liberties must, at times, be sacrificed to the social good. A man in the armed forces must not be so regimented and isolated from the rest of society by strict rules and regulations that he is no longer attuned to the needs of the society he has sworn to defend.

Only when the serviceman has demonstrated his obvious contempt for the flag in such a manner as to create dissention, disloyalty, poor morale or cast doubt upon the allegiance of the armed forces, should he be punished.

PERSPECTIVE THE CASE FOR MILITARY JUSTICE*

PROFESSOR JOSEPH W. BISHOP, JR.**

I hardly need to tell this audience that in the last decade American military justice, along with the armed forces generally, has been the target of a rolling barrage of criticism. The quality of that criticism has ranged from the informed and often reasonable, such as the articles of Professor Edward F. Sherman, to the ignorant and dishonest, such as Robert Sherrill's *Military Justice is to Justice as Military Music is to Music*, which enjoyed large sales and rave reviews, except from me¹ and one or two other cantankerous critics whose point of view was warped by their having some actual knowledge of the subject.

There have indeed been suggestions that the court-martial system should simply be abolished. They do not all come from people like the professional staffers of the American Civil Liberties Union, in whose eyes the typical court-martial is a kangaroo proceeding in which a wretched conscript is dragged before a panel of sadistic martinets, convicted on the basis of perjured evidence and his own confession, which has been extracted by torture, and sentenced to fifty or sixty years of solitary confinement, chained to the wall of a subterranean dungeon and fed on bread and water. When people like Professor Sherman seriously suggest that servicemen should be tried, even for service-connected offenses that affect military discipline, in federal civilian courts (including American district courts sitting in foreign countries),² we are bound to ask ourselves why there should be a separate system of

* This article is an edited version of Professor Bishop's remarks on the occasion of the Second Annual Edward H. Young lecture on Military Legal Education at The Judge Advocate General's School on 30 August 1973. The opinions expressed are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any governmental agency.

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¹ See Bishop, Book Review, COMMENTARY, June, 1971, p. 91.

² See Sherman, *Military Justice Without Military Control*, 82 YALE L. J. 1398 (1973).

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criminal justice for members of the armed forces. Why not try them in the civilian courts, with civilian process and civilian juries, like anybody else? From the constitutional stand-point, it would be perfectly possible for Congress to repeal the Uniform Code of Military Justice, add to the United States Penal Code sections covering the purely military offenses, and leave the trial of rogues military to the federal and state courts, which have always had, and often exercised, jurisdiction to try soldiers who violate civilian penal law.

The experiment has been tried in other countries. Under the *Grundgesetz* (the "Basic Law", essentially a constitution) of the Federal Republic of Germany, for example, the trial and punishment of members of the armed forces for all but petty offenses, including such purely military crimes as absence without leave and disobedience of orders, is by and large left to the civilian courts.³ The draftsmen of the West German Basic Law were, of course, reacting against a monstrous overdose of militarism, at a time when Germany had no armed forces and no spokesmen for the military point of view. For similar reasons Japan's "self-defense forces" get along without a military penal code or courts-martial. But in England, France, Russia and the United States, as in practically all of the other major military powers, soldiers are subjected to a distinctive code of military justice administered by military courts, although in the countries mentioned there may be review by civilian appellate judges. The reasons usually adduced in support of such a system, other than mere adherence to ancient custom, may be summarized as follows:

1. Military discipline cannot be maintained by the civilian criminal process, which is neither swift nor certain. Estimates of the percentage of civilian crimes which in this country go unpunished range from 80 to 95 per cent. There is some evidence

³ The *Grundgesetz* permits military courts to exercise complete criminal jurisdiction over members of the armed forces in time of war, or when they are stationed outside Germany or on naval vessels at sea. So far as I know, no use has yet been made of this authority. Military commanders can inflict minor "disciplinary" punishments, of which the most severe is three weeks confinement, and Military Service Courts can impose "career punishment," including reduction in rank and pay and dishonorable discharge, on career soldiers. See generally Moritz, *The Administration of Justice within the Armed Forces of the German Federal Republic*, 7 MIL. L. REV. 1 (1960); Krueger-Sprengel, *The German Military Legal System*, 57 MIL. L. REV. 17 (1972); Sherman, *Military Justice Without Military Control*, 82 YALE L. J. 1398, 1408-13 (1973).

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that in the West German army the incidence of absence without leave, desertion and insubordination is such as to raise serious doubt of its ability to defend the country.⁴ An army without discipline is in fact more dangerous to the civil population (including that of its own country) than to the enemy. The public interest in discipline is therefore entitled to greater weight, and the rights of the accused to less weight, in the military than in the civilian context. There has, indeed, been a great deal of rhetoric, some of it judicial, suggesting that soldiers are not entitled to anything properly describable as justice. "The machinery by which courts of law ascertain the guilt or innocence of an accused citizen, is too slow and too intricate to be applied to an accused soldier. For, of all the maladies incident to the body politic, military insubordination is that which requires the most prompt and drastic remedies. . . . For the general safety, therefore, a summary jurisdiction of terrible extent must, in camps, be entrusted to rude tribunals composed of men of the sword."⁵ The Supreme Court of the United States, considering the constitutionality of an amendment to the Articles of War passed by Congress during the Civil War,⁶ which for the first time gave courts-martial jurisdiction (although only in time of war, insurrection or rebellion) over murder, robbery, arson, burglary, rape and a number of other common crimes, said much the same thing: "It is a matter well known that the march even of an army not hostile is often accompanied with acts of violence and pillage by straggling parties of soldiers, which the most rigid discipline is hardly able to prevent. The offenses mentioned are those of most common occurrence, and the swift and summary justice of a military court was deemed necessary to restrain their commission."⁷ In modern times the Court has often stressed (not to say overstressed) the idea that military justice must of necessity be, in the words of Mr. Justice Black, "a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties."⁸ Justice Douglas, who is at times disposed to accept at face value the polemics of the New Left, spoke in a recent case of "so-called military justice."⁹

⁴ See, *The Disintegrating Army*, THE ECONOMIST, March 18, 1972, pp. 34, 37. But see Sherman, *supra* note 2, at pp. 1412-13.

⁵ 13 MACAULAY, HISTORY OF ENGLAND 35 (1856 ed.).

⁶ Act of March 3, 1863, ch. 75, §30, 12 Stat. 736.

⁷ Coleman v. Tennessee, 97 U.S. 509, 513 (1878).

⁸ Reid v. Covert, 354 U.S. 1, 35-36 (1957).

⁹ O'Callahan v. Parker, 395 U.S. 258, 266 (1969). He quoted with apparent approval a polemicist's assertion that "none of the travesties of

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Such language might indeed have been applied with approximate fairness to many courts-martial of the eighteenth and nineteenth centuries, or even to those of the two World Wars, for until comparatively modern times the needs of discipline were adduced as an excuse for very rough and summary treatment of military offenders. Shortly after World War I that towering legal scholar, Professor John H. Wigmore, made the argument in stronger terms than any Judge Advocate would use today. Military justice, he said, "*knows what it wants*" — i.e., discipline — "*and it systematically goes in and gets it.*" This clarity of purpose he compared favorably to the uncertainty of the civilian penal system as to whether it wants retribution, or prevention, or deterrence.¹⁰ Civilian criminal jurisprudence seems today no more sure of its goals than it was in 1921; indeed, it seems to have communicated some of its infirmity of purpose to the military.

Today, as lawyers with any knowledge of military law are well aware, the procedure prescribed by the Uniform Code of Military Justice is not appreciably rougher or more summary than civilian criminal process; in some respects (notably pretrial disclosure of the prosecution's evidence and the provision of automatic appellate review and free appellate counsel) it gives the accused more substantial protection than he would get in most civilian courts. It is unlikely that soldiers today run much, if any, greater risk of unjust conviction than do civilians.

The best statement of the "military discipline" argument today might be that its demands justify a procedure which, while it need not and should not increase the possibility of unjust conviction, does lessen the chance of unjust acquittal. In civilian jurisprudence the number of guilty men who are not punished is far, far greater than the number of innocent men who are, and few of us would have it otherwise. But the doctrine that it is better that ninety-nine (or nine-hundred and ninety-nine) guilty men go free than that one innocent be convicted is not easily squared with the need to maintain efficiency, obedience

justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, *Justice and Captain Levy*, 12 COLUMBIA FORUM 46, 49 (1969). Douglas' rhetoric did not sit well with the members of a panel which considered the problems of military justice at the American Bar Association's 1970 convention.

¹⁰ See Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. SOC'Y. 151 (1921).

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and order in an army, which is an aggregation of men (mostly in the most criminal age brackets) who have strong appetites, strong passions, and ready access to deadly weapons. Moreover, there are some types of conduct — desertion and insubordination, for example — which are not crimes at all in civilian life but whose deterrence is essential to the very existence of an army. If a soldier who runs away is punished, in Voltaire's expressive phrase, *pour encourager les autres*, the heartening effect is much diminished if ninety-nine per cent of deserters get away, because some jurors do not approve of restrictions on personal freedom, or have disagreeable memories of tough First Sergeants, or merely dislike the Army.

2. Another aspect of the discipline argument: Since discipline is a responsibility of the military commander, he should have some control of the machinery by which it is enforced — to decide, for instance, whether a particular offender should be prosecuted and what degree of clemency will best promote the efficiency of his command.¹¹

3. Military offenses — absence without leave, desertion, insubordination, cowardice, mutiny and the like — have no civilian analogues: The adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors.¹²

4. Soldiers may be stationed and commit crimes in places which are outside the jurisdiction of American civilian courts. There is probably no constitutional reason why federal district courts could not be given jurisdiction to try soldiers for offenses committed in foreign countries. Federal courts have long had extra-territorial jurisdiction over certain offenses — treason,

¹¹ "The exercise of military jurisdiction is also responsive to other practical needs of the armed forces. A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires." Harlan, J., dissenting in *O'Callahan v. Parker*, 395 U.S. 258, 282-83 (1969).

¹² "It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955).

for example, and some types of fraud on the government — committed by American citizens abroad. To be sure, the exercise of such jurisdiction is on its face hard to square with the Sixth Amendment's requirement that in all criminal prosecutions, the accused shall enjoy the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." But the Supreme Court has long read into this requirement of the Sixth Amendment an exception, analogous to that explicitly made to the Fifth Amendment's requirement of grand jury indictment, for military trial of cases "arising in the land or naval forces."¹³ The Court might well apply similar reasoning to civilian trials of soldiers for offenses committed overseas. If Congress has constitutional power to make offenses committed in foreign countries triable at all in federal courts,¹⁴ the Sixth Amendment's jury provision is obviously impossible to apply.

But Congress has never attempted to exercise its power to give the federal courts jurisdiction over crimes committed by American servicemen outside the United States. One obvious reason is the difficulty of bringing before a court sitting in the United States witnesses who live thousands of miles away.¹⁵ Both the public fisc and the ends of justice are better served if a trial can be held in the place where the crime was committed.

¹³ See, e.g., *O'Callahan v. Parker*, 395 U.S. 258, 262 (1969); *Reid v. Covert*, 354 U.S. 1, 37 (1957); Duke & Vogel, *The Constitution and The Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 441 (1960).

¹⁴ Section 2 of Article III of the Constitution, which deals with the judicial power of the United States, provides that "The trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." The Supreme Court has never questioned the power of Congress to make offenses, committed by American citizens outside the United States, triable in whatever federal court is most convenient, such as that in whose district he is first found or brought. *United States v. Bowman*, 260 U.S. 94 (1922); *Jones v. United States*, 137 U.S. 202 (1890); see *Toth v. Quarles*, 350 U.S. 11, 22 (1955). The Court of Military Appeals recently held that the provisions of Article III have no application to courts-martial. *Chenoweth v. Van Arsdaal*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973).

¹⁵ The Court of Claims, considering the constitutional justification for court-martialing servicemen who commit crimes against civilians in foreign countries, recently suggested that statutory provision for the trial in American courts "of crimes of violence committed against foreign nationals on the streets of foreign cities would encounter very serious problems of constitutional law and international law. . . . How could the testimony of eye witnesses be obtained?" *Gallagher v. United States*, 423 F.2d 1371, 1374-75 (Ct. Cl. 1970), cert. denied, 400 U.S. 849 (1970).

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Presumably for such reasons, Congress has since 1775 provided Articles of War, and for nearly as long articles for the Government of the Navy, which are now, of course, fused in the Uniform Code of Military Justice. There seems to be little disposition on Capitol Hill today to reform military justice by the simple technique of abolishing it. Considering the quantity and decibel-level of the diatribes against the military and all its works, including its penal system, which were chorused by large sections of the intellectual and pseudo-intellectual community, the news media, and other self-appointed opinion-makers during the Vietnam War, it is a tribute to our political institutions that most of the changes made by Congress and the courts in the midst of that war were reasonable and just (although some of the Congressional and judicial rhetoric which accompanied them was neither).

Military justice has, of course, changed greatly in the past decade. The curtailment of court-martial jurisdiction over crimes which do not affect military discipline; the creation of a relatively independent military judiciary; the slow but steady growth of the idea that soldiers have constitutional rights and the concurrent development by the federal courts of techniques, akin to those employed with state criminal law, for enforcing those rights; the reduction of command influence by giving soldiers a right to trial by military judges; the expansion of the accused's right to counsel; all these are major and, on the whole, beneficial changes. There is room for further reform before the point is reached at which change would present a substantial threat to military discipline and efficiency. I do not favor abolition of the separate system of military justice, nor even complete elimination of the military commander's role in it. But here are a few changes to which I think Congress might well give serious consideration.

1. I would expand the role of the independent military judiciary and, at least in the United States and in time of peace, make it exclusive. I would favor the creation of permanent military courts, consisting of a single judge for the trial of such minor offenses as are now tried by special courts-martial, and of three or five judges for the more serious offenses which are now tried by general courts. More civilians should be employed as military judges, at both the trial level and on the Courts of Military Review. Commanders would retain their present discretion as to whether charges should be referred to such courts for trial or, in the case of petty offenses, punished nonjudicially under

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Article 15. The commander would also retain his present power to reduce, suspend or commute punishment, but not his power to set aside a verdict or order a new trial. Although more difficult problems are raised in combat conditions and outside the United States, I see no obvious reasons why such courts could not function, at least as effectively as courts-martial of the present type, in those conditions too. Courts-martial did not sit in foxholes in any of our recent wars. Overall, it seems to me that such a system would relieve line officers of a burdensome and time-consuming task, retain the benefits of military expertise in the trial of military cases, and ensure adequate consideration of the needs of military discipline.

2. In all trials before such military tribunals the accused would be entitled to the services of a qualified lawyer as defense counsel. (As a practical matter, this is now the rule, but such doubt as remains might just as well be cleared up.) Such defense counsel should be responsible only to The Judge Advocates General, as military judges are now, and should include a substantial proportion of civilian employees. For reasons of administrative convenience, it might be advisable to organize prosecutors on a similar basis.

3. The Bad Conduct Discharge should be abolished, and only three or five-judge military courts should be empowered to award Dishonorable Discharges. The Bad Conduct Discharge is not in reality an appreciably less severe penalty than the Dishonorable, and it is hard to see what useful purpose it serves other than to preserve an ancient custom of the Navy.

4. The general articles should be repealed and replaced by more specific articles. In two recent cases Circuit Courts of Appeal have held them unconstitutionally vague.¹⁶ I doubt the rightness of these decisions, since in practice the scope of the general articles is pretty well known; few, if any, of the servicemen convicted under them — certainly not Captain Levy or PFC Avrech — could fairly claim to have been surprised to learn that their conduct was illegal.¹⁷ But even if the Supreme Court should reverse these decisions, I doubt the necessity for preserving the general articles in their present form. "Conduct unbecoming an

¹⁶ *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973); *Levy v. Parker*, 478 F.2d 772 (3rd Cir. 1973). The decision in the *Avrech* case did not pass on the constitutionality of Article 133 or the "crimes and offenses not capital" clause of Article 134.

¹⁷ See generally Wiener, *Are the General Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

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officer and a gentleman" is notoriously hard to define, and I may add that conduct which is unladylike is even harder. Acts which show unfitness for command are either chargeable as crimes, punishable by punitive discharge, or grounds for administrative elimination from the service. The "disorders and neglects to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces" clauses of Article 134 should be replaced by articles specifically proscribing the offenses, now spelled out in the Manual for Courts-Martial, which are actually charged under them. The "crimes and offenses not capital" clause should be recast as what in fact it is — an assimilative crimes act, incorporating the United States Penal Code, and perhaps made also to cover violations of non-federal penal codes.

5. Military criminal jurisdiction over reservists not on active duty should be abolished. Such jurisdiction over retired regulars should be limited to power to dismiss or dishonorably discharge them from the service without, however, cutting off their entitlement to a pension.

6. Article 88, denouncing commissioned officers' use of contemptuous words against the President, the Vice President, Congress, and so forth, ought to be repealed. It is probably unconstitutional under the First Amendment,¹⁸ and the very rarity of its invocation shows that it is not needed to preserve military discipline. Soldiers ought to have as much right as civilians to cuss out the Government, so long as they obey its lawful orders.

7. Decisions of the Court of Military Appeals should be made appealable to the Supreme Court, by petition for certiorari, in the same way as decisions of State Supreme Courts and the federal Courts of Appeal.

These suggestions represent, of course, only my own opinion, though some of them find support elsewhere. General Hodson, for example, seems to share some of my views, including my doubts about Article 134.¹⁹ At any rate, this seems to me to be a good time to think about such problems. We have managed to extricate ourselves from a prolonged and peculiarly unpleasant

¹⁸ The Court of Military Appeals held it constitutional in an opinion which I find singularly unconvincing. *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). See generally Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968).

¹⁹ See Hodson, *The Manual for Courts-Martial, 1984*, 57 MIL. L. REV. 1, 12 (1972).

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war, but I see no sign that the Millennium is at hand. There will be a couple of million men and women in the armed forces for as far as I can see into the future, and the problems of criminal justice in so large a community are unlikely to get any simpler.

RECENT DEVELOPMENT

Chambers v. Mississippi, — US — (1973) **THE CONSTITUTIONAL RIGHT TO PRESENT DEFENSE EVIDENCE.***

The manifest destiny of evidence law is a progressive lowering of the barriers to truth.

C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE
§81 (1954)

More than any other provision of the Constitution, the sixth amendment epitomizes the adversary process.¹ The amendment guarantees the accused the assistance of counsel² and the right to confront and cross-examine the prosecution witnesses against him.³ It also affords the accused the right to compulsory process to secure favorable, defense witnesses.⁴ Yet, the amendment is strangely silent on the procedural safeguard which is perhaps the most fundamental element of the adversary system: the accused's right to present a defense.

This country has a long-standing political and legal commitment to an adversary criminal system.⁵ The American Bar Association Advisory Committee on the Prosecution and Defense Functions has proclaimed that the adversary system "is central to our administration of criminal justice"⁶ and "is still the hall-

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

¹ U. S. CONST. amend. VI.

² *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Betts v. Brady*, 316 U.S. 455 (1942); *Powell v. Alabama*, 287 U.S. 45 (1932).

³ *Bruton v. United States*, 391 U.S. 123 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

⁴ *Washington v. Texas*, 388 U.S. 14 (1967).

⁵ In *Watts v. Indiana*, 338 U.S. 49, 54 (1949), the Supreme Court asserted that:

Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the continent whereby an accused was interrogated for hours on end.

⁶ A.B.A. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, p. 2 (approved draft, 1971).

mark of our way of arriving at justice" ⁷ Given this commitment, the amendment's omission of an express right to present defense evidence is indeed remarkable. However it is even more remarkable that the United States Supreme Court did not have an occasion to correct that egregious omission until 1967 when the Court decided *Washington v. Texas*.⁸ In the *Washington* case and in the ensuing decision in *Chambers v. Mississippi*,⁹ the Court has read a constitutional right to present defense evidence into the sixth amendment.

Defense attorneys have long been accustomed to using the provisions of the Bill of Right as a shield. They are familiar with the exclusionary rules applicable to evidence seized in violation of the fourth amendment,¹⁰ involuntary¹¹ and unwarned¹² confessions obtained in violation of the fifth amendment, and identification evidence obtained in violation of the sixth amendment.¹³ As a prophylactic protection for constitutional guarantees, the Supreme Court fashioned these exclusionary rules to bar the admission of illegally obtained evidence.¹⁴ The effect of these rules is essentially negative; on the accused's objection, prosecution evidence is excluded. In *Washington* and *Chambers*, however, the Court has shown defense counsel that the sixth amendment can be used as a sword.¹⁵ In both cases, the Court held that the trial

⁷ *Id.*

⁸ 388 U.S. 14 (1967).

⁹ 41 U.S.L.W. 4266 (U.S. February 21, 1973).

¹⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

¹¹ *Spano v. New York*, 360 U.S. 315 (1959); *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³ *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

¹⁴ Texts on the constitutional limitations on the law of evidence are customarily devoted solely to those exclusionary rules. See, e.g., B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES (2nd ed. 1969).

¹⁵ The Court's sixth amendment decisions in *Washington* and *Chambers* parallel the Court's fourth amendment decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the plaintiff was the victim of a search conducted by the defendant agents. The plaintiff framed his complaint to allege a violation of his fourth amendment right to freedom from unreasonable searches. The District Court dismissed the complaint for lack of jurisdiction. 276 F. Supp. 12 (E.D. N.Y. 1967). The Court of Appeals affirmed the dismissal on the ground that the complaint failed to state a cause of action. 409 F. 2d 718 (2nd Cir. 1967). The Supreme Court reversed. The Court held that the trial court had subject-matter jurisdiction and that the plaintiff could derive his cause of action directly from the fourth amendment. As in *Washington* and *Chambers*, the Court converted a provision, formerly used only as a shield, into a sword.

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judge erred in excluding defense evidence. In *Washington*, the Court held that a Texas statute disqualifying persons charged or convicted as accomplices from testifying violated the sixth amendment.¹⁶ In *Chambers*, the Court relied on *Washington* and held that the trial judge erred by the following the well-settled, Mississippi common-law rule excluding declarations against penal interest.¹⁷ In both cases, the effect of the Court's decision was affirmative; the Court held that the accused had a constitutional right to introduce evidence that was otherwise inadmissible under the jurisdiction's statutory or common-law rules of evidence.

In a classical sense, the Court's decisions are radical; they attack and shatter a virtually universal, root assumption that state legislatures and courts have plenary power to devise rules of competence applicable to defense evidence.¹⁸ As radical decisions, *Washington* and *Chambers* merit and demand comment. The purpose of this note is three-fold: (1) to review the line of decisional law culminating in *Chambers*; (2) to deduce from that decisional law a sound rationale to support the constitutional right to present defense evidence; and (3) to venture a guess or two as to future applications of this newly-recognized constitutional right.

I. THE DECISIONAL LAW CULMINATING IN *CHAMBERS*

A. BEFORE *WASHINGTON* AND *CHAMBERS*: *THE HARBINGERS*

Strictly speaking, the decisions in *Washington* and *Chambers* were unprecedented. Yet, a perceptive analyst might have been able to foretell the decisions. Two lines of authority presaged the decisions.

The first line of authority dealt with the due process right to a fair hearing. The line includes civil and criminal cases. In the final analysis, the line of cases employs a linguistic mode of analysis; the cases probed progressively deeper into the logical content of the phrase, "the defendant's right to a fair hearing."

It is a common-place expression that a civil or criminal defendant has the right to a fair hearing.¹⁹ One of the tenets of

¹⁶ 388 U.S. 14 (1967).

¹⁷ 41 U.S.L.W. 4266 (U.S. February 21, 1973).

¹⁸ 29 AM.JUR. 2d *Evidence* § 9 (1967).

¹⁹ 16 AM.JUR. 2d *Constitutional Law* §§ 569-84 (1964).

our jurisprudence is that a hearing is the most civilized, fair and reliable method of resolving factual disputes. It is a general proposition of procedural due process that a person must be afforded a hearing to resolve disputes of adjudicative facts if the dispute's resolution will affect the person's legally-protected interests.²⁰ In *Powell v. Alabama*,²¹ Mr. Justice Sutherland wrote that a hearing is a "... preliminary step essential to the passing of an enforceable judgment" ²² Hence, one of the major premises underlying our legal process is that, in part, a trial can be defined as a hearing for the defendant.

Refining the premise, the courts developed the rule that the defendant has a right to be heard at the trial. In *Twining v. New Jersey*,²³ the Supreme Court emphasized that each party to a judicial trial is entitled to an opportunity for hearing. In *Snyder v. Massachusetts*,²⁴ Mr. Justice Cardozo paraphrased the precedents when he stated simply that a defendant has a right to "... an adequate opportunity to be heard" ²⁵ The courts thus expanded the major premise by re-defining a trial as the forum at which the defendant is to be heard by the trier of fact.

The courts then focused on the meaning of the right to be heard. In defining that phrase, the courts cast the defendant in an active role; the courts held that the right to be heard by the trier of fact is synonymous with the right to present a defense to the trier of fact. The nature of the adversary system dictated the holding. The adversary system demands a clash, and the clash can occur only if the defendant is permitted to assume an active role. In *Holden v. Hardy*,²⁶ the Supreme Court pointed out that at early common law, the defendant had an essentially passive role at a criminal trial. The Court noted that a defendant charged with a felony did not have the right to call witnesses.²⁷ Speaking for the Court, Mr. Justice Brown expressed relief that "... so oppressive a doctrine has never obtained a foothold here." ²⁸ In *Hovey v. Elliott*,²⁹ the trial judge struck the defendant's answer and entered a decree *pro confesso* as a punishment for contempt.

²⁰ Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

²¹ 287 U.S. 45 (1932).

²² *Id.* at 68.

²³ 211 U.S. 77 (1908).

²⁴ 291 U.S. 97 (1934).

²⁵ *Id.* at 105.

²⁶ 169 U.S. 365 (1898).

²⁷ *Id.* at 386.

²⁸ *Id.*

²⁹ 167 U.S. 409 (1897).

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The Supreme Court held that the trial judge's action denied the defendant due process. In a forcefully written opinion, Mr. Justice White stressed the fundamental importance of the "... right to defend an action."³⁰

Having assigned the defendant an active role in the trial process, the courts then had to specify the manner in which the defendant would be permitted to carry out his role. The courts had two options. On the one hand, the courts could have permitted the defendant to only cross-examine the opposing witnesses; that is, the courts could have granted the defendant only the right to confrontation.³¹ On the other hand, the courts could permit the defendant to both attack the opposing witnesses and present his own evidence; in other words, in addition to granting the defendant the right to confrontation, the courts could recognize a substantive right to present defense evidence. The courts' choice of the second option was predictable. The clash of the offensive and defensive cases is the adversary system's mechanism for discovering truth, and the recognition of the right to present defense evidence heightens and intensifies the clash. In *Morgan v. United States*,³² the Supreme Court construed a provision of the Packers and Stockyards Act. In pertinent part, the Act guaranteed market agencies a "full hearing" in rate-fixing proceedings.³³ Reading the statute in light of "the rudimentary requirements of fair play,"³⁴ the Court interpreted the provisions as embracing "... the right to present evidence . . ."³⁵ In *Jenkins v. McKeithen*,³⁶ the Supreme Court's language was even more emphatic. In *Jenkins*, the Court passed on the constitutionality of the procedures of the Louisiana Labor-Management Commission of Inquiry. The Court noted that "(t)he Commission's procedures . . . drastically limit the right of a person investigated to present evidence on his own behalf."³⁷ The Court felt that the procedures left the person's right to present his case to "... the unfettered discretion of the Commission."³⁸ The Court squarely held that the procedures denied the appellant due process of law. The Court stated:

The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. * * * And, as we have noted

³⁰ *Id.* at 414.

³¹ U.S. CONST. amend. VI.

³² 304 U.S. 1 (1938).

³³ 7 U.S.C. § 211 (1921).

³⁴ *Morgan v. United States*, 304 U.S. 1, 15 (1938).

³⁵ *Id.* at 18.

³⁶ 395 U.S. 411 (1969).

³⁷ *Id.* at 429.

³⁸ *Id.*

... this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime.³⁹

In summary, the first line of authority evolved in the following fashion. At the outset, the courts posited the major premise of the defendant's procedural due process right to a fair hearing. The courts construed that right as including the defendant's right to be heard. The courts then reasoned that the right to be heard necessarily contemplates the defendant's right to actively defend the trial. Finally, the courts reached the conclusion that the due process clause assures the defendant a right to present defense evidence.

At the same time that the first line of authority was developing, a second line was creating a separate rationale for a constitutional right to present defense evidence. The second line arose from cases involving the trial judge's attempt to limit the number of witnesses a defendant could subpoena and proffer at trial.⁴⁰

The early cases dealt with the trial judge's attempt to limit the number of witnesses the defendant could subpoena. For example, in *Aikin v. State*,⁴¹ the trial court's rule prohibited the clerk from issuing more than five defense subpoenas in felony cases except upon court order. The appellate court pointed out that the state constitution gave the defendant the right to compulsory process. The court held that the trial court rule violated the constitutional guarantee. In *State ex rel. Plummer v. Gideon*,⁴² the Missouri court reached a similar result. In *Gideon*, the trial court's rule conflicted with express constitutional and statutory guarantees of compulsory process.

The attack then shifted to trial judge's attempts to limit the number of witnesses the defendant presented at trial. Some courts took the position that the trial judge has a discretionary power to limit the number of defense witnesses.⁴³ These courts over-turned limitations the trial judge imposed only if they felt that the numerical limitation was unreasonable and that the judge had abused his discretion.⁴⁴ Other courts treated the problem as one of constitutional dimensions. In *State v. Lyle*,⁴⁵ the trial judge limited the number of alibi witnesses the defendant could call.

³⁹ *Id.*

⁴⁰ See Annot., 17 A.L.R. 3d 327 (1968); Annot., 5 A.L.R. 3d 238 (1966).

⁴¹ 58 Ark. 544, 25 S.W. 840 (1894).

⁴² 119 Mo. 94, 24 S.W. 748 (1893).

⁴³ Annot., 17 A.L.R. 3d 327, 351 (1968).

⁴⁴ *Id.* at 359.

⁴⁵ 125 S.C. 406, 118 S.E. 803 (1923).

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The appellate court invalidated the limitation. The court couched its holding in due process terms. The court asserted that the limitation breached "... the fundamental principle of our criminal jurisprudence that an accused is entitled 'to be fully heard in his defense.' " ⁴⁶ Finally, in a significant line of Alabama cases, that State's appellate courts created a sixth amendment rationale for invalidating the limitations on the number of witnesses the defendant could call.

The seminal Alabama case is *Leverett v. State*.⁴⁷ In *Leverett*, the trial judge limited the defendant to six character witnesses. The appellate court pointed out that under the state constitution, the defendant had the right to compulsory process. The court held that the numerical limitation on the number of witnesses the defendant could present violated the compulsory process guarantee. The court proclaimed that "[t]he Constitution guarantees to the defendant compulsory process for his witnesses, and neither the Legislature nor the courts can deprive him of that right."⁴⁸ The court reiterated its view in *Willis v. State*⁴⁹ and *Williams v. State*.⁵⁰ In these cases, the Alabama courts hit upon the very rationale which years later, the Supreme Court would invoke in *Washington* and *Chambers*.

B. WASHINGTON V. TEXAS ⁵¹

The State of Texas alleged that Charles Fuller and Jackie Washington murdered an 18-year-old youth. Fuller was convicted of the murder before Washington came to trial. At the trial, Washington attempted to call Fuller as a witness. The defense counsel made an offer of proof that Fuller would testify that Washington had attempted to prevent him from firing the fatal shot. The trial judge rejected the offer. The trial judge relied upon two Texas statutes providing that persons charged or convicted as co-participants in the same offense are incompetent to testify for one another.⁵²

⁴⁶ *Id.* at 436, 118 S.E. at 814.

⁴⁷ 18 Ala.App. 578, 93 So. 347 (1922).

⁴⁸ *Id.* at 582, 93 So. at 351.

⁴⁹ 20 Ala.App. 572, 104 So. 141 (1925).

⁵⁰ 34 Ala.App. 253, 39 So. 2d 29, *cert. granted*, 251 Ala. 397, 39 So. 2d 37 (1948), *cert. denied*, 251 Ala. 696, 39 So. 2d 39 (1949).

⁵¹ 388 U.S. 14 (1967). See Comment, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972).

⁵² 400 S.W. 2d 756 (Tex. Crim. App. 1966).

Denied Fuller's testimony, the jury convicted Washington. The Texas Court of Criminal Appeals affirmed Washington's conviction. The Supreme Court granted certiorari and reversed the conviction.

Mr. Chief Justice Warren delivered the opinion of the Court. The opinion set forth two steps in a line of reasoning leading to the reversal of Washington's conviction.

In the first step, Mr. Chief Justice Warren concluded that the fourteenth amendment's due process clause applies the sixth amendment guarantee of compulsory process to the states. The Chief Justice advanced two arguments for his conclusion. First the Chief Justice stated that "... in recent years we have increasingly looked to the specific guarantees of the sixth amendment to determine whether a state criminal trial was conducted with due process of law."⁵³ The Chief Justice pointed to the decisions incorporating the sixth amendment rights to counsel,⁵⁴ confrontation,⁵⁵ speedy trial,⁵⁶ and public trial⁵⁷ as support for his statement. In effect, the Chief Justice argued that the Court had already incorporated the other sixth amendment guarantees into the fourteenth amendment due process clause and that the sixth amendment's wording furnishes no textual basis for distinguishing those rights from the right to compulsory process. Second, the Chief Justice asserted that the right to compulsory process is as important and fundamental a right as the other sixth amendment guarantees previously incorporated. The Chief Justice approvingly quoted *In re Oliver*:⁵⁸

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisdiction; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.⁵⁹

On the basis of these two arguments, the Chief Justice concluded that the right to compulsory process is "... a fundamental element of due process of law."⁶⁰

In the second step of his reasoning, the Chief Justice inquired whether the express right to compulsory process implies a right

⁵³ 388 U.S. 14, 18 (1967).

⁵⁴ *Id.*, citing *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁵ *Id.*, citing *Pointer v. Texas*, 380 U.S. 400 (1965).

⁵⁶ *Id.*, citing *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

⁵⁷ *Id.*, citing *In re Oliver*, 333 U.S. 257 (1948).

⁵⁸ 333 U.S. 257 (1948).

⁵⁹ 388 U.S. 14, 18 (1967).

⁶⁰ *Id.* at 19.

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to present the witnesses subpoenaed. The Chief Justice believed that the implication is proper, and he presented four arguments for his belief.

First, the Chief Justice marshalled historical evidence. The Chief Justice pointed out that in his Commentaries on the Constitution, Story notes not only that the English common-law rule was that the defendant was not allowed to introduce witnesses in his defense but also that the colonists felt that the common-law rule was oppressive.⁶¹ The Chief Justice was of the opinion that the Framers' inclusion of the right to compulsory process in the sixth amendment is persuasive evidence of their repudiation of the common-law view. The Chief Justice regarded the compulsory process guarantee as proof that the colonists subscribed to the diametrically contrary view that the defendant has a right to present witnesses on his behalf.

Second, the Chief Justice found support for his belief in *Rosen v. United States*.⁶² In the early case of *United States v. Reid*,⁶³ the Supreme Court held that one of two defendants jointly indicted for murder could not call the other as a witness. In *Reid*, the Court reasoned that the evidentiary rules governing in federal courts were the rules in force in the states at the time of the passage of the 1789 Judiciary Act, including the disqualification of jointly indicted defendants.⁶⁴ In *Rosen*, the Supreme Court overruled *Reid*. The *Rosen* Court liberated itself from "... the dead hand of the common law rule of 1789."⁶⁵ In retrospect, the Chief Justice opined that "(a)lthough *Rosen v. United States* rested on nonconstitutional grounds, we believe that its reasoning was required by the sixth amendment."⁶⁶

Third, the Chief Justice attempted to demonstrate that the rule disqualifying an alleged accomplice was arbitrary and irrational. The Chief Justice stated:

The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class

⁶¹ *Id.* at 19-20.

⁶² 245 U.S. 467 (1918).

⁶³ 12 How. 360 (1852).

⁶⁴ 388 U.S. 14, 21 (1967).

⁶⁵ 245 U.S. 467, 471 (1918).

⁶⁶ *Washington v. Texas*, 388 U.S. 14, 22 (1967).

with more nobility than one might expect to find in the public at large.⁶⁷

Finally, the Chief Justice constructed an argument that the express compulsory process guarantee necessarily implies a right to present defense evidence. The thrust of the argument was that without such an implied right, the prosecution could render the express compulsory process guarantee nugatory. The Chief Justice asserted that:

... (I)t could hardly be argued that a State would not violate the (compulsory process) clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.⁶⁸

The Chief Justice closes his argument with the claim that "the Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."⁶⁹

While Mr. Justice Harlan concurred in the result, he disagreed with the Chief Justice's rationale.

Mr. Justice Harlan devoted the first part of his brief opinion to a criticism of the majority's incorporation theory. The Justice rejected the view that the fourteenth amendment's due process clause is "reducible to 'a series of isolated point . . .'"⁷⁰ Rather, the Justice entertained a more flexible conception of due process; he asserted that due process is "... a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . ." ⁷¹

Mr. Justice Harlan contended that the majority had misstated the issue in the case: "... this is not . . . really a problem of 'compulsory process' at all . . ." ⁷² Mr. Justice Harlan felt that the compulsory process guarantee's wording could not reasonably bear the construction that there was an implied right to present defense evidence. The Justice thought that the case should be resolved on due process grounds:

I concur in the result in this case because I believe that the State may not constitutionally forbid the petitioner, a criminal defendant, from introducing on his own behalf the important testimony of one

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 23.

⁷⁰ *Id.* at 24.

⁷¹ *Id.*

⁷² *Id.*

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indicted in connection with the same offense, who would not, however, be barred from testifying if called by the prosecution. Texas has put forward no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness, and I can think of none. This is . . . a case in which the State has recognized as relevant and competent the testimony of this type of witness, but arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.⁷³

The commentators have noted that Mr. Chief Justice Warren's opinion recognized an implied right to offer the testimony of defense witnesses.⁷⁴ However, some of the commentators share Mr. Justice Harlan's view that the compulsory process guarantee's wording cannot be construed as creating an implied right to present defense evidence.⁷⁵ While urging a Due Process rationale for the result in *Washington*, one commentator asserted that "[r]eference to the sixth amendment's language casts doubt upon this (the Chief Justice's) interpretation."⁷⁶

It would be best to evaluate the Chief Justice's opinion by reviewing each of his arguments separately.

The Chief Justice's historical evidence is too inconclusive to be persuasive. The available data supports an inference that the colonists rejected the common-law view that the defendant should not be permitted to call witnesses on his own behalf, but it is quite another matter to demonstrate that the colonists believed that (1) the opportunity to present defense evidence should be treated as a separate, substantive right and (2) the right to present defense evidence was elevated to the level of a constitutional guarantee. The Chief Justice's data falls short of demonstrating these latter two propositions.

The Chief Justice's analysis of *Reid* and *Rosen* also fails to justify the result in *Washington*. It must be conceded that the result in *Rosen* is consistent with *Washington*, but neither the holding nor the language in *Rosen* dictates the *Washington* decision.

The Chief Justice's third argument is a convincing one. Given the line of cases developing the doctrine of the defendant's right to a fair hearing, there is a strong argument that it is unconstitutional to place arbitrary limitations on the defendant's opportunity to present his case. However, the rub is that the argument does not fit the Chief Justice's sixth amendment rationale. The

⁷³ *Id.*

⁷⁴ See, e.g., Comment, *The Preclusion Sanction: A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972); Note, 46 TEX. L. REV. 795 (1968).

⁷⁵ Note, 46 TEX. L. REV. 795, 798-99 (1968).

⁷⁶ *Id.* at 799.

argument is based upon considerations of arbitrariness, irrationality, and unfairness, considerations peculiar to substantive and procedural due process analysis. The argument sounds in due process rather than compulsory process.

In short, the Chief Justice's sixth amendment rationale must stand on his fourth argument. Mr. Justice Harlan and some of the commentators have generally suggested that the Chief Justice's argument is strained.⁷⁷ It would be more precise to say that the Chief Justice's opinion is elliptical and his reasoning fallacious.

The argument is a species of argument *reductio ad absurdum*. In effect, the Chief Justice argued that unless there is an implied right to present defense, the prosecution could force an absurd and patently unconstitutional result. If the Chief Justice had explicitized his reasoning, the argument would have run along these lines: if there is no implied right to present defense evidence, the defense may introduce only such proof as the jurisdiction's law of evidence permits; if the defense is so limited, the defense must accept any exclusionary rule; if the defense must abide by even arbitrary exclusionary rules, it is conceivable that the jurisdiction could make "all defense testimony inadmissible as a matter of procedural law;"⁷⁸ if the jurisdiction could exclude all defense evidence, the state could render the sixth amendment compulsory process guarantee nugatory; and, finally, to give the compulsory process guarantee a purposive construction, the Court cannot assume that the Framers intended to ". . . commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use."⁷⁹

The fallacy in the Chief Justice's reasoning should be evident. The Chief Justice cannot reach the absurd result he arrives at without positing an unsound intermediate step: the lack of an implied right to present defense evidence compels the conclusion that the defense must accept even arbitrary limitations on the defendant's opportunity to present his case. In truth, without recognizing an implied sixth amendment right to present defense evidence, the Court has ample power to invalidate arbitrary limitations on the defendant's opportunity to present his case. If the limitations are arbitrary in the sense that they are irrational, the Court could invalidate them on a substantive due process ration-

⁷⁷ 388 U.S. 14, 24 (1967); Note, 46 TEX. L. REV. 795, 798-99 (1968).

⁷⁸ 388 U.S. 14, 22 (1967).

⁷⁹ *Id.* at 23.

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ale.⁸⁰ If the limitations are unfair in the sense that they constitute fundamentally unfair procedures, the Court could invalidate them on a procedural due process rationale.⁸¹ Since due process is a limitation on government powers separate and distinct from the compulsory process limitation, the Court could review and invalidate state exclusionary rules on due process grounds even when no compulsory process considerations come into play.

A close examination of the Chief Justice's line of reasoning thus demonstrates that while the compulsory process guarantee strongly suggests a right to defense evidence, an implied right to present defense evidence is not a necessary implication from the compulsory process guarantee.

In fine, the Chief Justice's first and second arguments fall short of demonstrating that either the historical evidence or the precedents dictate the recognition of an implied, constitutional right to present defense evidence; the Chief Justice's third argument is convincing but unsuited to a sixth amendment rationale; and the Chief Justice's *reductio ad absurdum* argument cannot withstand scrutiny.

While the line of reasoning supporting an implied sixth amendment right to present defense evidence might have been weak, the majority nevertheless accepted the reasoning; and an implied sixth amendment right to present defense evidence became an element of the law of the land. However, like most landmark cases, *Washington* raised more questions than it answered. Moreover, the elliptical nature of Mr. Chief Justice Warren's majority opinion compounded the difficulties facing the lower courts which were now required to follow and explicate *Washington*.

C. BETWEEN WASHINGTON AND CHAMBERS: THE STRUGGLE TO RESOLVE WASHINGTON'S AMBIGUITIES

It cannot be denied that in *Washington*, Mr. Chief Justice Warren could have reasoned more explicitly and defined the scope of the implied right to present defense evidence more precisely. Nevertheless, the Chief Justice had clearly announced two rules of law.

The first rule was that the fourteenth amendment's due process clause applied the sixth amendment's compulsory process guar-

⁸⁰ 16 AM.JUR.2d *Constitutional Law* § 550 (1964).

⁸¹ *Id.* at §§ 544-49.

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antee to the states.⁸² The Chief Justice had made that rule unmistakably clear, and the lower courts, both state and federal, unanimously followed the rule.⁸³

The second rule was that the compulsory process guarantee prohibited states from adopting a broad rule disqualifying a defendant's accomplices from testifying on his behalf.⁸⁴ Any *bona fide* reading of Mr. Chief Justice Warren's opinion made that rule equally clear. In *United States v. Nolte*,⁸⁵ the Court of Appeals for the Fifth Circuit recognized that "... a defendant has the right to have an accomplice testify in his behalf."⁸⁶ Texas, the jurisdiction which originated *Washington*, conceded an accused's right to call a co-defendant as a witness in *Thompson v. State*⁸⁷ and *Hall v. Texas*.⁸⁸

While the courts agreed that *Washington* promulgated these two rules, there was serious disagreement as to the significance of the Chief Justice's broad language about a right to present defense evidence.

Most courts were of the opinion that *Washington* applied generally to rules limiting the competence of witnesses. Most courts felt that *Washington* meant at least that the defense had a right to put its witnesses on the stand. Quoting the Chief Justice's opinion, the Texas Court of Criminal Appeals stressed in *Hardin v. State*⁸⁹ that:

It is a fundamental element of due process of law that an accused has the right to present his own witnesses to establish a defense, and due process of law is denied when the State arbitrarily denies the accused the right to put on the stand a 'witness who was physically and mentally capable of testifying to events that he had per-

⁸² 388 U.S. 14, 19 (1967).

⁸³ *Buckner v. States*, 56 Wis.2d 406, 202 N.W.2d 406 (1972); *State v. Peyton*, 493 P.2d 1393 (Or.App. 1972); *People v. Edwards*, 51 Wis.2d 231, 186 N.W.2d 193 (1971); *Ex parte Pennington*, 471 S.W.2d 578 (Tex. Crim. App. 1971); *Reagon v. State*, 253 Ind. 143 (1970) (dissenting opinion); *State v. Groppi*, 41 Wis.2d 312, 164 N.W.2d 266 (1969); *State v. Gann*, 254 Or. 549, 463 P.2d 570 (1969); *Cruz v. State*, 441 S.W.2d 452 (Tex.Crim.App. 1969); *United States ex rel. Jablonsky v. Follette*, 291 F.Supp. 828 (S.D. N.Y. 1968); *People v. Cavanaugh*, 69 Cal.3d 262, 70 Cal.Rptr. 438, 444 P.2d 110 (1968); *People v. Perez*, 96 P.R.R. 6 (1968); *United States v. Deegan*, 279 F. Supp. 53 (S.D. N.Y. 1967); *Overton v. State*, 419 S.W.2d 371 (Tex. Crim.App. 1967).

⁸⁴ 388 U.S. 14, 22-23 (1967).

⁸⁵ 440 F.2d 1124 (5th Cir. 1971).

⁸⁶ *Id.* at 1126.

⁸⁷ 480 S.W.2d 624 (Tex.Crim.App. 1972).

⁸⁸ 475 S.W.2d 778 (Tex.Crim.App. 1972).

⁸⁹ 471 S.W.2d 60 (Tex.Crim.App. 1971).

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sonally observed, and whose testimony would have been relevant and material.'⁹⁰

The Chief Justice's language similarly impressed other courts, and these courts applied *Washington* in a myriad of contexts. In *United States v. Mendez-Rodriguez*,⁹¹ the Court of Appeals for the Ninth Circuit applied *Washington* where the Government deported three witnesses before the defendant could interview them. In *United States v. Wolfson*,⁹² the District Court for Delaware indicated that it would apply *Washington* if the defendant could demonstrate that the Government had deliberately sent witnesses beyond the territorial reach of the court's compulsory process. The Court of Appeals for the Fifth Circuit concluded that unless the defendant knew of or procured the witness' violation of a sequestration order, the defendant's right to compulsory process prevents the trial judge from excluding the witness' testimony.⁹³ The Supreme Court of Hawaii reached the same result in *State v. Leong*.⁹⁴ In *Bray v. Peyton*,⁹⁵ the prosecuting attorney had a defense witness arrested and incarcerated before he could testify, and the court's response was to invoke *Washington*. The Court of Appeals for the Ninth Circuit has gone so far as to hold that in some circumstances, *Washington* requires that a defendant in pretrial confinement be released temporarily to enable him "... to prepare his defense by lining up witnesses ..." ⁹⁶ In *Dancy v. State*,⁹⁷ the court invoked the compulsory process guarantee in holding that the trial judge abused his discretion when he excluded a surprise defense witness. Finally, in *Webb v. Texas*,⁹⁸ the Supreme Court revisited the issue. In *Webb*, before the defendant's witness took the stand, the trial judge admonished the witness that he did not have to testify; that if he lied, the judge would personally ensure that the charge of perjury was referred to the grand jury; and that if he were convicted of perjury, parole would be unlikely. The Court held that the trial judge "... effectively drove that witness off the stand. ..." ⁹⁹

⁹⁰ *Id.* at 62.

⁹¹ 450 F.2d (9th Cir. 1971).

⁹² 322 F.Supp. 798 (D.Del. 1971), *aff'd*, 454 F.2d 60 (3rd Cir. 1972).

⁹³ *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972). *But see* *Puze v. State*, 243 So.2d 442 (Fla. 1971).

⁹⁴ 51 Hawaii 581, 465 P.2d 560 (1970).

⁹⁵ 429 F.2d 500 (4th Cir. 1970).

⁹⁶ *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970).

⁹⁷ 259 So.2d 208 (Fla. 1972).

⁹⁸ — U.S. — (1972).

⁹⁹ *Id.* at —.

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This expansive view of the defendant's right to put his witnesses on the stand is widespread. There has been only one fact situation where the decided cases have refused to apply *Washington*: if the witness indicates that he will invoke his privilege against self-incrimination, the appellate courts have permitted the trial judges to prevent the defendant from placing the witness on the stand.¹⁰⁰ Here the courts have relied upon footnote 21 to the Chief Justice's opinion in *Washington*:

Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualification for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.¹⁰¹

With the single exception of this fact situation, there is a general consensus that the *Washington* rationale grants the defendant a general right to put physically and mentally competent defense witnesses on the stand.

Until *Chambers*, however, there was no such consensus on the question whether the implied right to present defense evidence would override particular exclusionary rules regulating the testimony's content such as the hearsay rule. Did the right expend its force when it placed the defense witness on the stand? After the defendant seated his witness, was he then bound by whatever exclusionary rules the legislatures and courts chose to apply to his witness? The District Court for Nebraska stated in *Holloway v. Wolff*¹⁰² that "[i]t is apparent from *Washington* that the constitutional right of compulsory process means more than a right of compulsory attendance at trial;"¹⁰³ but its sister courts queried, "How much more?"

Defense counsel soon began pressing for an answer to that query. For example, in *Johnson v. Turner*¹⁰⁴ the defendant argued on appeal that the trial judge erred in excluding evidence the defendant had offered and that the error violated the defendant's right to compulsory process. The Court of Appeals for the

¹⁰⁰ *Commonwealth v. Greene*, 445 Pa. 228, 285 A.2d 865 (1971); *People v. Isenor*, 17 Cal.App.3d 324, 94 Cal.Rptr. 746 (Dist.Ct.App. 1971); *State v. Mitchell*, 487 P.2d 1156 (Or.App. 1971).

¹⁰¹ 388 U.S. 14, 23, n. 21 (1967).

¹⁰² 351 F. Supp. 1033 (D.Neb. 1972).

¹⁰³ *Id.* at 1037.

¹⁰⁴ 429 F.2d 1152 (10th Cir. 1970).

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Tenth Circuit avoided the issue because the defendant had not raised the argument in the trial court.¹⁰⁵

In general, the courts were not receptive to such defense arguments. Some courts gave the Chief Justice's opinion a narrow reading. In two cases, the issue arose in connection with challenges to the constitutionality of notice-of-alibi statutes.¹⁰⁶ In both cases, the courts sustained the statutes. In the first case, *State ex rel. Simos v. Burke*,¹⁰⁷ the Wisconsin court limited *Washington* to a prohibition of "... an absolute ban on certain categories of witnesses being called to testify by the defense."¹⁰⁸ In the second case, *Bush v. State*,¹⁰⁹ the Kansas court read *Washington* as proscribing only "... an across the board disqualification, as witnesses for an accused, of all persons charged or convicted as co-participants in the same crime."¹¹⁰ Other courts found solace in footnote 21.¹¹¹

In truth, the courts had begun to realize the revolutionary consequences which a literal reading of the Chief Justice's language in *Washington* could lead to, and most courts instinctively rushed to the defense of the time-honored exclusionary rules. In *Myers v. Frye*,¹¹² the Court of Appeals for the Seventh Circuit brushed aside a defense argument that *Washington* permitted the defense to introduce otherwise inadmissible evidence. The Court struck a conservative note: "The Sixth Amendment does not operate to prevent the State from adopting any limitations on defense evidence in criminal trials, but prevents only the adoption of broad arbitrary limitations."¹¹³ In *People v. Bridgeforth*,¹¹⁴ the defense counsel cited *Washington* and sought disclosure of privileged public aid records. The court denied disclosure. In the leading case, *People v. Scott*,¹¹⁵ the defense counsel offered hearsay evidence. In addition to arguing that the evidence fell within recognized exceptions to the hearsay rule, the defense counsel argued alternatively that *Washington* required the evidence's admission. The appellate court upheld the trial judge's exclusion

¹⁰⁵ *Id.* at 1155.

¹⁰⁶ *Bush v. State*, 203 Kan. 494, 454 P.2d 429 (1969); *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 163 N.W.2d 177 (1968).

¹⁰⁷ 41 Wis.2d 129, 163 N.W.2d 177 (1968).

¹⁰⁸ *Id.* at 181.

¹⁰⁹ 203 Kan. 494, 454 P.2d 429 (1969).

¹¹⁰ *Id.* at 500, 454 P.2d at 434.

¹¹¹ *Holloway v. Wolff*, 351 F.Supp. 1033, 1038 (D.Neb. 1972).

¹¹² 401 F.2d 18 (7th Cir. 1968).

¹¹³ *Id.* at 21.

¹¹⁴ 51 Ill.2d 52, 281 N.E.2d 617 (1972).

¹¹⁵ 52 Ill.2d 432, 288 N.E.2d 478 (1972).

of the evidence. The court stated flatly that "... [t]here is no suggestion in *Washington* that the admission of otherwise inadmissible hearsay is constitutionally required."¹¹⁶

It is true that when *Scott* was decided, the issue of the scope of the right to present defense evidence was still unsettled. Moreover, since the prevailing view refused to extend *Washington* beyond a right to put the defense witness on the stand, the *Scott* court's decision was defensible. But it is also true that the *Scott* court overstated its case when it asserted that there was "no suggestion" in *Washington* that the implied right to present defense evidence might, in an appropriate case, override an exclusionary rule regulating the content of testimony. Mr. Chief Justice Warren's opinion contained repeated references to "the right to offer the testimony of witnesses."¹¹⁷ and "the right to present the defendant's version of the facts."¹¹⁸ While the question of the references' interpretation was not without doubt, the language could reasonably bear the interpretation that defense counsel had been urging. Moreover, all the privileges listed in footnote 21 were exclusionary rules based on external social policies rather than the reliability considerations underlying the best evidence and hearsay rules.¹¹⁹

Most importantly, the *Scott* court failed to understand the logical structure of the Chief Justice's fourth argument in *Washington*. If the court had understood the Chief Justice's logic, the court would have realized that defense counsel could construct a perfectly parallel argument for overriding exclusionary rules. If, as in *Washington*, the Court effectively renounced the right to invalidate exclusionary rules on due process grounds, we again reach the absurd and patently unconstitutional result that a jurisdiction could exclude all defense evidence. The line of reasoning corresponds to the line of reasoning the majority implicitly accepted in *Washington*. If the Supreme Court had realized the flaw in the *Washington* ratio, the Court's decision in *Chambers* might have been different. In fact, rather than repudiating Mr. Chief Justice Warren's line of reasoning, the Burger Court embraced *Washington* in *Chambers*. The *Washington* decision made *Chambers* possible and expectable.

¹¹⁶ *Id.* at 439, 288 N.E.2d at 482.

¹¹⁷ 388 U.S. 14, 19 (1967).

¹¹⁸ *Id.*

¹¹⁹ C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 72, 78, 87, 118, 229, and 245 (2nd ed. 1972).

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D. Chambers v. Mississippi ¹²⁰

Like Jackie Washington, Leon Chambers was charged with murder. Gable McDonald had confessed to the murder Chambers was charged with; McDonald had given a sworn confession to Chambers' attorneys. McDonald also made incriminating statements to three of his friends. However, at the preliminary hearing, McDonald repudiated his sworn confession. Chambers filed a pretrial motion requesting that the court order McDonald to appear at trial. Chambers also sought an advance ruling that if the prosecution did not call McDonald as a witness, the defense counsel could treat McDonald as an adverse witness. The trial court granted the motion requiring McDonald's appearance but reserved ruling on the motion for permission to treat McDonald as an adverse witness.

At the trial, the prosecuting attorney failed to call McDonald as a witness. Chambers then called McDonald to the stand. On direct examination, the trial judge permitted the defense counsel to introduce McDonald's sworn confession and read the confession to the jury. Upon cross-examination, McDonald again repudiated the confession. McDonald further denied that he committed the homicide. At the conclusion of the cross-examination, the defense counsel renewed his motion for permission to examine McDonald as an adverse witness. The trial judge denied the motion. Chambers then called as witnesses the three friends McDonald had made incriminating statements to. The defense counsel attempted to elicit each witness' testimony that McDonald had admitted to him that he had committed the homicide. In each case, the prosecuting attorney objected that the evidence was incompetent hearsay. In each case, the trial judge sustained the objection. The jury convicted Chambers, and the Mississippi Supreme Court unanimously affirmed the conviction.¹²¹ The Supreme Court granted certiorari and, in an opinion written by Mr. Justice Powell, reversed the conviction.

It is indisputable that under the Mississippi common-law of evidence, the trial judge's rulings were correct. The ruling, denying Chambers permission to treat McDonald as an adverse witness, followed Mississippi's "voucher" rule: if a party calls a witness, he vouches for that witness' credibility and may not treat the witness as an adverse witness.¹²² The ruling excluding McDonald's

¹²⁰ — U.S. — (1973).

¹²¹ *Chambers v. Mississippi*, 252 So.2d 217 (1971).

¹²² *Id.*

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statements to his friends was a mechanical application of Mississippi hearsay doctrine.¹²³ Like many jurisdictions, Mississippi does not recognize declarations against penal interest as an exception to the hearsay rule.¹²⁴

Although the trial judge's application of the Mississippi common-law of evidence was flawless, Mr. Justice Powell concluded that the combined effect of the two rulings flawed Chambers' trial and amounted to a violation of the fourteenth amendment's due process clause.

In Section III of his opinion, Mr. Justice Powell used the same quotation from *In re Oliver*¹²⁵ which Mr. Chief Justice Warren had cited in *Washington*.¹²⁶ Mr. Justice Powell quoted the language to the effect that the due process clause includes both "a right to examine the witnesses against him" (confrontation) and "a right to offer testimony" (the right to present defense evidence). The Justice proceeds to explain why the trial judge's first ruling violated the confrontation guarantee and the second ruling violated the compulsory process guarantee.

Mr. Justice Powell devotes Section III.A. of his opinion to an analysis of the confrontation issue. The Justice first attacks the validity of the "voucher" rule. He characterizes the rule as an anachronism:

Although the historical origins of the "voucher" rule are uncertain, it appears to be a remnant of primitive English trial practice in which "oath-takers" or "compurgators" were called to stand behind a particular party's position in any controversy. Their assertions were strictly partisan and, quite unlike witnesses in criminal trials today, their role bore little relation to the impartial ascertainment of facts. Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process. . . . (I)n modern criminal trials defendants are rarely able to select their witnesses; they must take them where they find them.¹²⁷

Having disposed of the "voucher" rule, Mr. Justice Powell counters Mississippi's argument that a defendant has no constitutional right to confront witnesses he himself calls to the stand. The Justice rejoins that:

¹²³ *Brown v. State*, 99 Miss. 719, 55 So. 961 (1911). See also C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 278 (2nd ed. 1972).

¹²⁴ *Id.*

¹²⁵ 333 U.S. 257, 273 (1948).

¹²⁶ 388 U.S. 14, 18 (1967).

¹²⁷ — U.S. — (1973).

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The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State.¹²⁸

The Justice states that, realistically, McDonald was an accuser: "... in the circumstances of this case, McDonald's retraction inculcated Chambers to the same extent that it exculpated McDonald."¹²⁹ Citing *Pointer v. Texas*,¹³⁰ the Justice concludes that the trial judge's first ruling violated the defendant's right to confrontation.¹³¹

Mr. Justice Powell devotes Section III.B. of his opinion to an analysis of the compulsory process issue. Just as he criticized the "voucher" rule, the Justice attacks the rule excluding declarations against penal interest. He concedes that most states still limit the declaration against interest exception to statements against pecuniary or proprietary interest, but he adds that a number of states have discarded the materialistic limitation on the exception.¹³² He notes and appears to empathize with the "considerable scholarly criticism" of the materialistic limitation.¹³³ He further points out that in *United States v. Harris*,¹³⁴ the Supreme Court held that an informant's declaration against penal interest carries its own indicia of credibility. He uses *Harris* as proof that declarations against penal interest are "unquestionably against interest" and that the materialistic limitation is irrational. Then, citing both *Washington* and *Webb*, Mr. Justice Powell invokes the right to present evidence.¹³⁵ In holding that the trial judge's second ruling was unconstitutional, the Justice emphasizes that the defendant's evidence was both reliable and critical.¹³⁶

The Justice concludes his opinion by stating that "... [T]he exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process."¹³⁷ He states that the Court refrains from holding whether either error alone would have amounted to a denial of

¹²⁸ *Id.* at ____.

¹²⁹ *Id.* at ____.

¹³⁰ 380 U.S. 400 (1965).

¹³¹ ____ U.S. ____ (1973).

¹³² *Id.* at ____.

¹³³ *Id.* at ____.

¹³⁴ 403 U.S. 573 (1971).

¹³⁵ ____ U.S. ____ (1973).

¹³⁶ *Id.* at ____.

¹³⁷ *Id.* at ____.

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due process.¹³⁸ Finally, in a superbly understated manner which must have chagrined the *Scott* court, he states that "[i]n reaching this judgment we establish no new principles of constitutional law."¹³⁹

Mr. Justice White filed a concurring opinion. Mr. Justice White first addresses Mr. Justice Rehnquist's argument in dissent that the defendant had not properly raised the issue at the trial court level. The Justice ends his opinion with the brief statement that "[a]s to the merits, I would join in the Court's opinion and judgment."¹⁴⁰

Mr. Justice Rehnquist dissented. He devotes most of his opinion to the contention that the constitutional questions the majority opinion turned on were not properly before the Court. Matching Mr. Justice White's brevity, Mr. Justice Rehnquist begins his opinion with the statement that "Were I to reach the merits of this case, I would have considerable difficulty in subscribing to the Court's further *constitutionalization of the intricacies of the common law of evidence*."¹⁴¹

Clearly, the *Scott* court had misread *Washington*. The *Scott* court could find "no suggestion" in the *Washington* opinion that the implied right to present defense evidence could ever prevail over an exclusionary rule regulating the content of defense testimony.¹⁴² In *Chambers*, the Supreme Court not only found but, more importantly, adopted the suggestion.

Chambers is such a recent decision that few courts have had an opportunity to apply the *Chambers* doctrine. However, following *Chambers*, the Court of Appeals for the Ninth Circuit has already held that where it is critical to the defendant's case to impeach the defendant's own witness, the defendant has a right to do so.¹⁴³ In an even more recent opinion, the Pennsylvania Superior Court announced that:

Public policy, the fundamental principles of fairness and due process of law require the admission of declarations against penal interest where it can be determined that those statements: (1) exculpate the defendant from the crime for which he is charged; (2) are inherently trustworthy in that they are written or orally made to reliable persons of authority or those having adverse interests to

¹³⁸ *Id.* at ____.

¹³⁹ *Id.* at ____.

¹⁴⁰ *Id.* at ____.

¹⁴¹ *Id.* at ____ (emphasis added).

¹⁴² *People v. Scott*, 52 Ill.2d 432, 288 N.E.2d 478 (1972).

¹⁴³ *United States v. Torres*, 13 Cr.L. 2189 (9th Cir. April 23, 1973).

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the declarant; and, that they are made pre-trial or during the trial itself.¹⁴⁴

II. THE DEDUCTION OF A SOUND RATIONALE FROM THE DECISIONAL LAW

The two most troublesome issues which the decisional law poses are the conceptual basis for the right to present defense evidence and the right's scope. In large part, the resolution of these issues depends upon the rationale selected to support the right. There are four plausible formulations for the right: (1) the right is an element of fifth amendment due process of law; (2) the right is necessarily implied from the sixth amendment compulsory process guarantee; (3) the right is a penumbral sixth amendment right; and (4) the right is a product of the interplay between the fifth and sixth amendments.¹⁴⁵

¹⁴⁴ Commonwealth v. Hackett, 13 Cr.L. 2321 (Pa.Super.Ct. June 14, 1973).

¹⁴⁵ A fifth rationale, a ninth amendment right to present defense evidence, is conceivable. Mr. Justice Goldberg's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), stimulated a revival of interest in the ninth amendment. Comment, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 TEMP.L.Q. 46 (1968); Kutner, *The Neglected Ninth Amendment*, 51 MARQ.L.REV. 121 (1968); Bertelsman, *The Ninth Amendment and Due Process of Law—toward a Viable Theory of Unenumerated Rights*, 37 U.CINN.L.REV. 777 (1968); Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?* 53 A.B.A.J. 1033 (1967); Comment, *The Ninth Amendment*, 11 S.D.L.REV. 172 (1966); Franklin, *The Ninth Amendment as Civil Law Method and its Implications for the Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TUL.L.REV. 487 (1966); Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH.L.REV. 197 (1965); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH.L.REV. 219 (1965). However, there are serious, and perhaps insuperable, obstacles to constructing a ninth amendment rationale for the right to present defense evidence. In the first place, while Mr. Justice Douglas' *Griswold* opinion treated the ninth amendment as an independent source of unenumerated rights, Mr. Justice Goldberg's opinion rejected the view that the ninth amendment "... constitutes an independent source of rights protected from infringement by either the States or the Federal Government." 381 U.S. at 492. Rather, Mr. Justice Goldberg used the ninth amendment as evidence supporting an expansive interpretation of the due process clause. In the second place, given the Supreme Court's present composition, it is highly unlikely that the Court would invoke a ninth amendment rationale. The Court seems too conservative in temperament to resort to such a rationale. In the third place, assuming that the Court were willing to treat the ninth amendment as an independent source of rights, the question would then arise whether the right to present defense evidence would qualify as one of the unenumerated, ninth amendment rights. The proponent of a ninth amendment rationale would probably encounter the same difficulties Mr. Chief Justice Warren faced when he attempted a historical demonstration in *Washington* that the Framers conceived of the opportunity to present defense evidence as a con-

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Before discussing each formulation, we should specify the criteria to be used to evaluate these alternative rationales. Four criteria come to mind.

First, the formulation must recognize a substantive right to present defense evidence. As a matter of policy, the adversary process cannot operate optimally unless the accused is afforded a right to present his defensive case. As a matter of constitutional law, *Washington* and *Chambers* demand the recognition of this right. All of the four plausible rationales satisfy this criterion.

Second, the formulation must permit the courts to rationalize an appropriately limited scope of the right. There are three possible scopes the courts could utilize.

The first scope would be a right to present any relevant defense evidence. The argument supporting this scope is superlatively appealing. Under civilian law, the defendant is entitled to subpoena witnesses if the witnesses' testimony is relevant and material.¹⁴⁶ If the courts derive the implied right from the express right to compulsory process, it can be argued that the derivative right should have the same scope as the right to compulsory process; that is, it would be arguable that the defense has the right to present any relevant, material evidence. However, this argument is a *non sequitur*; while it would be unjustifiable to define the scope of the derived right more broadly than the express right's scope, there is no legal or logical difficulty in defining its scope more narrowly.

stitutional right. In the fourth place, the ninth amendment rationale does not satisfy the second criterion. There is no element of the inner workings of a ninth amendment rationale which would suggest any scope limitation other than relevance. A ninth amendment rationale would be incomplete because the Court would have to arbitrarily graft the third scope onto the rationale. Finally and most importantly, the wording of the *Washington* and *Chambers* opinions will not support a ninth amendment interpretation. Try as one might, anyone reading those opinions in good faith could not stretch or shape their language into a ninth amendment mold. For these reasons, the article does not treat a ninth amendment formulation as a plausible rationale.

¹⁴⁶ *State v. Groppi*, 41 Wis.2d 312, 164 N.W.2d 266 (1969). In military law it is a well-settled requirement that the witness must be essential; that is, the witness' testimony must be both relevant and necessary. See *United States v. Jones*, 21 U.S.C.M.A. 215, 44 C.M.R. 269 (1972); *United States v. Manos*, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967); *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957). See also Comment, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342, 1364 (1972) ("In *Washington v. Texas*, the Supreme Court established that the Compulsory Process Clause of the Sixth Amendment afforded the defendant a right to present all relevant and material testimony in his defense.")

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Moreover, there are weighty counter-arguments against accepting the first, broad statement of the right's scope. If the Court granted the defendant an absolute right to introduce all relevant defense evidence, that right would prevent trial judges from applying exclusionary rules based on either reliability considerations or external social policies to defense evidence. If the trial judge could not apply rules of competence, based on reliability considerations, such as the best evidence and hearsay rules, there would be a serious impairment to the jurisdictions' ability to protect the integrity of their fact-finding processes. The purpose of these rules of competence is to ensure that the evidence presented to the trier of fact has at least minimal reliability.¹⁴⁷ The states have a legitimate interest in adopting rules designed to ensure the reliability of the adjudicatory process.¹⁴⁸ If the trial judge could not apply rules of competence, based on external social policies, such as the privileges for confidential communications between an attorney and his client and spouses, there would be a serious impairment of the society's ability to protect those relationships. In the Supreme Court's mind, these counter-arguments would probably outweigh the enticing logical symmetry of holding that the implied right to present defense evidence has the same broad scope as the express right to compulsory process.¹⁴⁹

The second scope would be a right to present all relevant, reliable defense evidence. This scope represents a moderate compromise between the defendant's and the Government's interests. On the one hand, the defendant would have the right to introduce his evidence irrespective of the trial judge's assessment of the evidence's importance. On the other hand, this scope protects Government interests to a much greater extent than the first scope. By requiring reliability as well as relevance, the scope secures the Government's interest in the integrity of the fact-finding process. The disadvantage of accepting the second scope

¹⁴⁷ See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §§ 229-31 and 244-45 (2nd ed. 1972).

¹⁴⁸ The Supreme Court's retroactivity decisions, stressing the importance of the accuracy of the adjudicatory process, highlight the legitimacy of this interest. See, e.g., *Gosa v. Warner*, — U.S. — (1973) ("the accuracy of the process by which judgment was rendered"); *Johnson v. New Jersey*, 384 U.S. 719, 728-29 (1966) ("the integrity of the truth-determining process at trial").

¹⁴⁹ Moreover, if the Court adopted the first scope, defense counsel could then plausibly argue that every erroneous exclusion of defense evidence was an error of constitutional dimensions. The Burger Court would probably be loathe to reach such a result.

is that like the first, the second scope overrides competence rules based on social policies rather than reliability considerations. In light of footnote 21 in the Chief Justice's *Washington* opinion, this disadvantage probably makes the second scope unacceptable to the Supreme Court.¹⁵⁰

The third scope is the right to present relevant, reliable, and critical defense evidence. This is the scope which the Supreme Court will probably opt for. In the *Washington* opinion, Mr. Chief Justice Warren stressed that the excluded witness' testimony was "... vital to the defense."¹⁵¹ In his *Chambers* opinion, Mr. Justice Powell twice referred to the "critical" nature of the excluded evidence.¹⁵² In the recent Ninth Circuit decision following *Chambers*, *United States v. Torres*,¹⁵³ the Court of Appeals took up the same theme and pointed out that the excluded evidence was "... crucial to (the defendant's) defense ..."¹⁵⁴ The third statement of the right's scope permits the trial judge to assess the evidence's importance. This scope represents an attempt to balance the defendant's and the Government's interests. The reliability requirement ensures the integrity of the fact-finding process, and the criticality requirement ensures that competence rules based on external social policies will yield, if at all, only when the defendant has demonstrated a subordinating interest in presenting his evidence.

Since it is likely that the Supreme Court will adopt the third scope, it would be best to select a rationale which naturally suggested or dictated that scope. If some other rationale were selected, the rationale would necessarily be incomplete; the Court would still have to find some justification for wedding the rationale to the third scope.

The third criterion is that the formulation must include a judicially manageable scope limitation. All four rationales satisfy this criterion. Each rationale naturally admits of one of the three scope limitations, and each limitation is judicially manageable. Trial judges are certainly familiar with the parameters of relevance.¹⁵⁵ Because of the high incidence of motions to suppress on fourth amendment grounds, trial judges have learned the

¹⁵⁰ 388 U.S. 14, 23 n. 21 (1967).

¹⁵¹ *Id.* at 16.

¹⁵² — U.S. — (1973).

¹⁵³ 13 Cr.L. 2189 (9th Cir. April 4, 1973).

¹⁵⁴ *Id.*

¹⁵⁵ C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 184-85 (2nd ed. 1972).

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teaching of *Aguilar v. Texas*,¹⁵⁶ *Spinelli v. United States*,¹⁵⁷ and *United States v. Harris*;¹⁵⁸ and, in so doing, they have become expert in evaluating evidence's reliability.¹⁵⁹ Finally, in passing on such procedural matters as motions for new trial, trial judges constantly evaluate the importance and criticality of evidence.¹⁶⁰ Whether the scope limitation is phased in terms of relevance or reliability or criticality, the trial judges should find the limitation manageable.

Fourth, the decisional law must support the formulation; the rationale must be consistent with the language in the *Washington* and *Chambers* opinions. If, as legal realists, we are primarily interested in predicting judicial behavior, we should accept the decided cases as our given and deduce a model rationale from the given case law. It would perhaps be intellectually satisfying to start anew and construct a novel rationale for the right to present defense evidence, but that effort would be of little use to the trial judges attempting to apply *Chambers* or the counsel appearing before these judges.

With these four criteria in mind, we now turn to an analysis of the four most plausible rationales for the constitutional right to present defense.

A. AN ELEMENT OF DUE PROCESS OF LAW

A strong argument can be made that the right to present defense evidence should be based on the due process clause. In principle, the concept of due process is sufficiently elastic to include the right, and *Jenkins v. McKeithen*¹⁶¹ shows that the Court is willing to read to right to present defense evidence into the clause.

In addition, this rationale would readily lend itself to the third scope limitation. If the court uses a due process formulation, the court would test the challenged evidentiary rule by the standard of fundamental fairness. The defendant could hardly argue that the rule was unfair if it excluded irrelevant or unreliable evi-

¹⁵⁶ 378 U.S. 108 (1964).

¹⁵⁷ 393 U.S. 410 (1969).

¹⁵⁸ 403 U.S. 573 (1971).

¹⁵⁹ See Gilligan, *Probable Cause and the Informer*, 60 *MILL. REV.* 1 (1973).

¹⁶⁰ *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 1969 (REV. ED.), para.

109. [hereinafter cited as *MCM*, 1969.]

¹⁶¹ 395 U.S. 411 (1969).

dence. Nor could the defendant successfully contend that his evidence's exclusion would render the trial fundamentally unfair unless the evidence was critical. This rationale is not only compatible with the scope limitation; this rationale would probably necessitate use of the third scope.

Perhaps Mr. Justice Harlan had these reasons in mind when, in his *Washington* concurring opinion, he urged that the Court base its decision on due process rather than compulsory process.¹⁶² Commentators have concurred with Mr. Justice Harlan; some have recommended that the Court return to a due process rationale in the interest of "... simplicity, flexibility, and candor"¹⁶³ However, it is unlikely that the Supreme Court will retreat from its preference for a sixth amendment rationale in criminal cases. *Washington v. Texas* is unquestionably a sixth amendment decision.¹⁶⁴ *Chambers* is even stronger evidence of the Court's commitment to a sixth amendment formulation. In *Chambers*, the Court granted certiorari on an issue couched in due process terms: "... whether petitioner's trial was conducted in accord with principles of due process under the Fourteenth Amendment."¹⁶⁵ If the Court preferred a fifth amendment rationale, the Court could easily have cited *Jenkins* and decided the case with no mention of sixth amendment considerations. In fact, the Court disregarded *Jenkins* and based its holding squarely on *Washington*.¹⁶⁶ In short, the Court went out of its way to apply a sixth amendment rationale. The due process formulation might survive as an alternative theory. Indeed, in civil cases, the due process standard will probably be the primary theoretical basis for a right to present evidence. However, in criminal cases, it is highly probable that the Court will continue to rely upon a sixth amendment rationale.

B. A RIGHT NECESSARILY IMPLIED FROM THE COMPULSORY PROCESS GUARANTEE

The strongest argument in favor of this rationale is that it apparently is the formulation Mr. Chief Justice Warren attempted to develop in *Washington*.¹⁶⁷ However, analytically, the rationale is seriously flawed.

¹⁶² 388 U.S. 14, 24 (1967).

¹⁶³ Note, 46 TEX.L.REV. 795, 799 (1968).

¹⁶⁴ 388 U.S. 14, 19-23 (1967).

¹⁶⁵ — U.S. — (1973).

¹⁶⁶ *Id.* at —.

¹⁶⁷ See notes 68-69 and accompanying text.

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In the first place, as previously stated, the right to present defense evidence is not a necessary implication of the express compulsory process provision. The Chief Justice correctly perceived that an argument *reductio ad absurdum* was the only method of proving that the right is a necessary implication of the sixth amendment's language: the Court could properly infer an implied right to present defense if the failure to do so would render the compulsory process guarantee nugatory. However, one of the intermediate steps in the Chief Justice's line of reasoning was fallacious. The Chief Justice incorrectly assumed that without the implied right, the Court would be powerless to invalidate arbitrary limitations on the defendant's opportunity to present his case. In fact, the Court could invalidate such limitations by using its due process powers. Without creating a sixth amendment right to present defense evidence, the Chief Justice could have easily avoided the absurd result which was the crux of his argument.

Another serious objection to this rationale is that it does not satisfy the second criterion. The internal logic of this formulation does not furnish any basis for imposing the reliability and criticality requirements. There is no necessary connection between the rationale and the third scope limitation. To adopt this rationale would be to adopt an incomplete rationale. If, as appears likely, the Supreme Court will define the right's scope as a right to present relevant, reliable, and critical defense evidence, the Court would have to complete this formulation by arbitrarily imposing the third scope limitation on the substantive right.

The serious flaws in the second formulation require that we reject this rationale just as we rejected the first.

C. A PENUMBRAL SIXTH AMENDMENT RIGHT

In two cases, the Supreme Court has used a penumbral method of analysis; using emanations from specific Constitutional provisions, the Court has created a general, composite right and used that right as the basis for a decision. In *N.A.A.C.P. v. Alabama*,¹⁶⁸ the Court derived a general first amendment right of association from that amendment's specific guarantees of freedom of speech, press, assembly, and petition.¹⁶⁹ In the leading *Griswold* case, Mr. Justice Douglas specifically used the terms "penumbra" and "emanation."¹⁷⁰ The Justice argued that emanations from the

¹⁶⁸ 357 U.S. 449 (1958).

¹⁶⁹ *Id.* at 460-63.

¹⁷⁰ 381 U.S. 479 (1965).

first, third, fourth, fifth and ninth amendments created a penumbral right of privacy.¹⁷¹ Professor Emerson has described Mr. Justice Douglas' methodology in the following fashion:

[A]lthough the Constitution nowhere refers in express terms to a right of privacy, nevertheless various provisions of the Constitution embody separate aspects of such a concept, and the composite of these protections should be accorded the status of a recognized constitutional right.¹⁷²

The penumbral theory has been subjected to severe criticism. Professor Kauper has noted two of the criticisms. First, he notes that some fear that the doctrine will dangerously expand judicial powers. In his opinion, the doctrine permits an "expansive use of the judicial power to formulate conceptions of fundamental rights as a limitation on legislative invasion . . ." ¹⁷³ Second, he points out that the doctrine coincides with due process to such an extent that it is doubtful that the doctrine has any independent content:

[A] theory of implied rights can be pushed to the point where the distinction between such "implied rights" and the formulation of "fundamental" rights in the interpretation of the due process clause is wholly verbal and without substance.¹⁷⁴

Although these criticisms are telling, they do not appear to be unanswerable. The first criticism raises the question whether, under a Legal Realist conception of the law, a written constitution or statute can serve as an effective restraint on judicial power. Many subscribe to Mr. Justice Stone's view that the only absolute restraint on judges' power is their "own self-restraint."¹⁷⁵ For analysts of this persuasion, the first criticism misses the point: ". . . [T]he specific provisions of the Constitution lend themselves to personal interpretations by judges no less than the general restrictions of the due process clause."¹⁷⁶

The second criticism poses a more serious problem. In the final analysis, this criticism amounts to an argument that if the due process clause is as broad as and potentially broader than the penumbral theory, there is no need for the theory and that it would be wiser to rely upon the express clause than an unneces-

¹⁷¹ *Id.* at 484.

¹⁷² Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH.L.REV. 219, 228 (1965).

¹⁷³ Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental, and Things Forgotten; the Griswold Case*, 64 MICH.L.REV. 235, 252 (1965).

¹⁷⁴ *Id.*

¹⁷⁵ *United States v. Butler*, 297 U.S. 1, 79 (1936).

¹⁷⁶ Handler, *Atonality and Abstraction in Modern Antitrust Law*, 52 A.B.A.J. 621, 624 (1966).

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sary theory. Viewed in this light, the argument is not so much a criticism of the penumbral theory as it is an argument that it is unnecessary to resort to the theory when the Supreme Court is willing to read the due process clause broadly.

It is interesting to note that although individual justices, principally Mr. Justice Douglas, have cited *Griswold* in subsequent decisions,¹⁷⁷ the Court has not used the penumbral theory as the basis for any subsequent decision. President Nixon's appointments to the Court make it less likely that the Court will ever again employ the penumbral theory.

If the Court were willing to do so, defense counsel could present a strong argument for a penumbral sixth amendment right to present defense evidence. In *Griswold*, Mr. Justice Douglas cited the provisions of the first, third, fourth, fifth and ninth amendments. Proponents of a right to present defense evidence could point to the individual guarantees of the sixth amendment: the rights to counsel, confrontation, compulsory process, and jury trial. Mr. Justice Douglas derived a general right to privacy from the specific guarantees he cited. Proponents of a right to present defense evidence could derive a right to an adversary criminal hearing from the specific guarantees of the sixth amendment. Then, just as Mr. Justice Douglas extracted a right of marital privacy from the general right of privacy, proponents of the right to present defense evidence could extract that right from the general right to an adversary criminal hearing. Assuming that the Supreme Court was amenable to using the penumbral theory, it would be wholly appropriate to use the theory as the basis for the right to present defense evidence. That theory would seem to be conceptually sounder than the necessary implication argument that Mr. Chief Justice Warren used in *Washington*.

Yet this theory is subject to the same criticism which undermines the implied right theory. The formulation does not satisfy the second criterion. The penumbral right formulation is as incomplete as the implied right formulation. The internal logic of a penumbral right to present evidence neither naturally suggests nor requires the third scope limitation. To complete the formulation, the Court would have to add the scope limitation, and that additional would require a separate justification. Other than relevance, there are no inherent limitations on the scope of a penumbral sixth amendment right to present defense evidence. The third formulation is deficient in the same respect as the second.

¹⁷⁷ See, e.g., *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Mr. Justice Douglas dissenting); *Schmerber v. California*, 384 U.S. 757, 778 (1966) (Mr. Justice Douglas dissenting).

*D. A PRODUCT OF THE INTERPLAY BETWEEN THE
FIFTH AND SIXTH AMENDMENTS*

The fourth rationale is that the right to present defense evidence is a product of the interplay between the fifth amendment due process clause and the sixth amendment compulsory process clause. Although the various rights stated in the Bill of Rights are distinct guarantees, the rights are not entirely independent. In *Boyd v. United States*,¹⁷⁸ the Supreme Court pointed out that in some cases, the fourth and fifth amendments run . . . almost into each other."¹⁷⁹ The two most significant decisions on the interplay of Constitutional provisions are *Griffin v. Illinois*¹⁸⁰ and *Douglas v. California*.¹⁸¹ In *Griffin*, the Court dealt with the constitutionality of certain features of Illinois criminal appellate practice. Under that practice, a convicted defendant could obtain full direct appellate review only if he furnished the appellate court with a bill of exceptions or report of trial. The State furnished free transcripts to only indigent defendants sentenced to death. The Court held that as a result of the interplay between the due process and equal protection guarantees, any indigent defendant had a right to a free transcript. In *Douglas*, the court reviewed a California appellate procedure. Under the procedure, the district court of appeals refused to appoint counsel for an indigent appellant if, after reviewing the record, the court concluded that "no good whatever could be served by appointment of counsel."¹⁸² Citing *Griffin*, the Supreme Court held that the practice denied the defendant ". . . that equality demanded by the Fourteenth Amendment."¹⁸³ Dissenting, Mr. Justice Harlan pointed out that the majority appeared to ". . . rely both on the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause. . . ." ¹⁸⁴

The right to present defense evidence would be an especially appropriate subject matter for the application of the interplay theory. In *Braswell v. Wainwright*,¹⁸⁵ the Court of Appeals for the Fifth Circuit recognized that a defendant's right to obtain and offer witnesses is "closed related" to his right to due process.¹⁸⁶

¹⁷⁸ 116 U.S. 616 (1886).

¹⁷⁹ *Id.* at 630.

¹⁸⁰ 351 U.S. 12 (1956).

¹⁸¹ 372 U.S. 353 (1963).

¹⁸² *Id.* at 355.

¹⁸³ *Id.* at 358.

¹⁸⁴ *Id.* at 360-61.

¹⁸⁵ 463 F.2d 1148 (5th Cir. 1972).

¹⁸⁶ *Id.* at 1155.

In *Braswell*, the District Court judge had excluded the testimony of a witness who violated a sequestration order. The Court of Appeals held that the trial judge's action "... denied Braswell his Sixth Amendment right, and rendered his trial fundamentally unfair."¹⁸⁷ In *Lawrence v. Henderson*,¹⁸⁸ the District Court for the Eastern District of Louisiana stated that the relationship between the two guarantees is so intimate that compulsory process "... is a necessary correlative of due process of law."¹⁸⁹ The basic theory that the right to present defense evidence can be based on interplay between the fifth and sixth amendments is a sound one.

Moreover, the interplay formulation shares an important advantage with the pure fifth amendment theory: the formulation is compatible with the third scope limitation. As Professors Kamisar and Choper have pointed out, the startling innovation in the *Griffin-Douglas* line of authority was that the Court used the due process guarantee as a principle for limiting the equal protection guarantee.

The root idea of the *Griffin* and *Douglas* cases may not be that every inequality of any consequence in the criminal process is taboo, but only due process incorporates a basic notion of equality. It may be that the *Griffin-Douglas* principle does not come into play unless and until "discriminations" based on wealth work an inequality so significant in the criminal process as to amount to "fundamental unfairness."¹⁹⁰

While the Court had traditionally used the Bill of Rights guarantees as limitations on government powers, in *Griffin* and *Douglas* the Court used one guarantee, due process, as a method of limiting another guarantee, equal protection. If the Court adopts the interplay formulation, the Court can use fundamental fairness as a limiting principle. If the Court can do so, it could adopt the third scope limitation: it is not unfair to exclude irrelevant or unreliable evidence, and the exclusion of even relevant, reliable evidence will not render a trial fundamentally unfair unless the evidence is critical.¹⁹¹

The next question is whether the language of the *Washington* and *Chambers* opinions will support this formulation. The obvious answer is yes. Both opinions are replete with references to due process and compulsory process considerations.

¹⁸⁷ *Id.* at 1157.

¹⁸⁸ 344 F.Supp. 1287 (E.D.La. 1972).

¹⁸⁹ *Id.* at 1295.

¹⁹⁰ Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN.L.REV. 1, 10 (1963).

¹⁹¹ See note 160 and accompanying text.

The final question is whether in *Chambers*, the Court explicitly adopted the interplay formulation. The answer is no. As previously stated, Mr. Justice Powell's opinion stated that the trial judge's second ruling violated *Washington*; that together, the two rulings denied the defendant due process; but that the Court was not deciding whether either violation alone would have necessitated reversal. If the Court had held that the second ruling alone would not have required reversal, we would probably be justified in treating *Chambers* as an adoption of the interplay rationale: in effect, the Court would have said that the evidence's exclusion would not have amounted to constitutional error unless the exclusion rendered the proceeding fundamentally unfair. If the Court had so held, the only other possible explanation for the decision would have been a two-step incorporation theory: first, the court asks whether the ruling would have violated the Bill of Rights if a federal judge has made the ruling, and then the court inquires whether the ruling renders the proceeding fundamentally unfair. At any rate, the Court found it unnecessary to make the holding. We must conclude that although the interplay rationale is the best formulation and surely consistent with the *Washington* and *Chambers* opinions, we cannot read *Chambers* as expressly adopting the interplay rationale to the exclusion of the other plausible rationales.

III. FUTURE APPLICATIONS OF THE RIGHT TO PRESENT DEFENSE EVIDENCE

A. THE DISTINCTION BETWEEN THE TYPES OF COMPETENCE RULES

Any discussion of the future applications of the right to present defense evidence requires an understanding of the two types of rules of evidentiary competence. The first type of competence rule is based upon probative dangers. Probative dangers include such factors as prejudice, confusion, and undue consumption of time.¹⁹² The best examples of the first type of competence rule are the best evidence and hearsay rules. The best evidence rule represents a judgment that secondary evidence of a document's contents is unreliable.¹⁹³ The hearsay rule represents a similar judgement that when the truth of an extra-judicial statement

¹⁹² C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185 (2nd ed. 1972).

¹⁹³ *Id.* at §§ 229-31.

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is in issue, in-court testimony as to the extra-judicial statement is unreliable.¹⁹⁴ In short, the first type of competence rule is based upon dangers which inhere in the nature of the evidence. In contrast, the second type of competence rule is based upon social policies external to the evidence.¹⁹⁵ There are no probative dangers inherent in the evidence, but the evidence's admission will interfere with a social policy the Government desires to advance. The common-law and constitutional privileges fall within this category. The common-law attorney-client privilege excludes evidence of confidential communications between an attorney and his client because the State desires to foster that relationship.¹⁹⁶ Similarly the fourth amendment exclusionary rule excludes illegally seized evidence because it is believed that the exclusion will deter future police violations of the fourth amendment.¹⁹⁷

The *Chambers* case is such a recent decision that the courts have not yet had an opportunity to decide whether *Chambers* should be applied to both types of competence rules. We shall now address that issue.

1. Competence Rules Based upon Probative Dangers

The only three decided cases applying the right to present defense evidence to rules regulating the content of witnesses' testimony are *Chambers*, *Commonwealth v. Hackett*,¹⁹⁸ and *United States v. Torres*.¹⁹⁹ An analysis of the cases demonstrates that in each case, the court invalidated a competence rule based upon probative dangers. In *Chambers*, the Supreme Court invalidated the trial judge's ruling excluding the declarations against penal interest. The trial judge had applied the Mississippi, common-law hearsay doctrine, a competence rule based on probative dangers. In *Hackett*, the Pennsylvania Superior Court attacked the Pennsylvania hearsay doctrine, excluding declarations against penal interest. In *Torres*, the court of appeals held that the trial

¹⁹⁴ *Id.* at §§ 244-45.

¹⁹⁵ *Id.* at § 72.

¹⁹⁶ *Id.* at §§ 87-88.

¹⁹⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961). But see Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J.P.S. & AD. 36 (1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Wright, *Must the Criminal Go Free if the Constable Blunders?* 50 TEX.L.REV. 736 (1972); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.CHI.L.REV. 665 (1970).

¹⁹⁸ 13 Cr.L. 2321 (Pa.Super.Ct. June 14, 1973).

¹⁹⁹ 13 Cr.L. 2189 (9th Cir. April 23, 1973).

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judge erred when he prevented the defendant from impeaching his own witness. The trial judge had applied the common-law rule that unless a witness' testimony is surprising and affirmatively damaging, the witness' proponent may not impeach him.²⁰⁰ The common-law rule is not designed to effectuate any independent social policy such as the protection of a privileged relationship or constitutional rights. Aside from the discredited theory that the party vouches for the credibility of all of his witnesses,²⁰¹ the rule rests upon the fear that "... the power to impeach is the power to coerce the witness to testify as desired, under the implied threat of blasting his character if he does not."²⁰² The rule is based upon the probative risk that if the witness realizes that his proponent can "blast his character," the witness will consciously or subconsciously color his testimony to suit the proponent.

It makes eminent good sense to use the *Chambers* doctrine to override competence rules based on probative danger. Assuming that the Court ultimately adopts the third scope limitation, *Chambers* will apply only if the proponent can show that his evidence is relevant, reliable, and critical. If the defendant makes such a showing, the Government has little justification for applying a competence rule based on probative dangers to exclude the defendant's evidence. The requirement for reliability should remove any substantial danger of the admission of wholly untrustworthy evidence. The requirement for criticality will ensure that collateral considerations such as prejudice or distraction are overridden only when the defendant has a compelling reason for doing so. If the proponent makes the showing required by the third scope limitation, his showing should either remove the reason for the common-law rule or clearly outweigh that reason.

The following is a partial, illustrative list of the types of competence rules based on probative danger that are susceptible to *Chambers* attacks:

(1) Limitations on methods of impeachment. Many of the limitations on methods of impeachment are based solely on probative dangers rather than external social policies. The rule many civilian jurisdictions still follow, excluding opinion evidence of

²⁰⁰ See generally C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 38 (2nd ed. 1972).

²⁰¹ *Chambers v. Mississippi*, — U.S. — (1973).

²⁰² C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 38 (2nd ed. 1972).

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truthfulness and veracity, is such a rule.²⁰³ The military courts have not yet decided whether to admit expert, psychiatric testimony as to a witness' truthfulness and veracity, and to date only a few jurisdictions have admitted such evidence.²⁰⁴ Like the military, many civilian jurisdictions still apply the oft-maligned foundation requirement for impeachment by prior inconsistent statements.²⁰⁵ Still other jurisdictions have placed rather arbitrary restrictions on the types of acts of misconduct which may be shown to impeach credibility.²⁰⁶ All of these rules are based such probative dangers as the possibility that the evidence's admission will create collateral issues in the case. If a defense counsel presented relevant, reliable, and critical evidence which would otherwise be inadmissible under one of these rules, the military judge could easily follow Mr. Justice Powell's lead and rule that the competence rule in question "... may not be applied mechanistically to defeat the ends of justice."²⁰⁷ The military judge would be most likely to make such a ruling in a case in which the credibility of a prosecution witness was the pivotal issue.

(2) Limitations on the methods of rehabilitating witnesses. On the whole, the military and civilian limitations on the methods of rehabilitating witnesses' credibility seem more arbitrary than the respective restrictions on the methods of impeaching witnesses. In general, the rules are based on the probative danger that if rehabilitating evidence is liberally admitted, the evidence will introduce many distracting, collateral issues into the case.²⁰⁸ Here again, in the face of a showing that the defendant's rehabilitating evidence was relevant, reliable, and critical, the military judge might override the normal competence rule. A case in which the defendant raised the alibi defense and the prosecution mounted a massive attack on the alibi witness' credibility would be a perfect case for an application of the *Chambers* doctrine.

²⁰³ *Id.* at § 44. The text asserts:

Misguided it seems is the first choice of the majority doctrine that this attack on character for truth must be in the abstract, debilitated form of proof of reputation.

Cf. para. 138f(1), MCM, 1969.

²⁰⁴ The California courts admit such evidence to impeach the credibility of the complaining witness in sex offense persecutions. *People v. Russell*, 443 P.2d 794 (Cal. 1968); *People v. Neely*, 39 Cal.Rptr. 251 (Dist.Ct. App. 1964).

²⁰⁵ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 37 (2nd ed. 1972). See para. 153b(2) (c), MCM, 1969.

²⁰⁶ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 42 (2nd ed. 1972).

²⁰⁷ *Chambers v. Mississippi*, — U.S. — (1973).

²⁰⁸ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 49 (2nd ed. 1972). See para. 153a, MCM, 1969.

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(3) Limitations on opinion testimony. Some of the limitations on opinion evidence are probably vulnerable to attack. There is some authority that the ultimate fact prohibition applies in military practice,²⁰⁹ and it is clear that some civilian jurisdictions still apply the rule that even an expert may not testify on an ultimate fact.²¹⁰ While a growing number of jurisdictions including the military are contra, many still follow the rule that an expert may not base an opinion on reports even if they are of the type customarily relied upon in the practice of his specialty.²¹¹ The defense counsel would probably argue *Chambers* where he is attempting to introduce important scientific evidence and the prosecutor objects on the basis of one of these technical, competence rules.

(4) Limitations on character evidence. Several of the limitations on defense character evidence are open to attack. The military has long adhered to the progressive view that a party may present both reputation and opinion evidence of character.²¹² However, many civilian jurisdictions still cling to the view that opinion evidence is inadmissible.²¹³ *Chambers* attacks on these rules are virtually inevitable.

(5) The best evidence rule. As previously stated, the best evidence rule rests on the judgment that secondary evidence of a document's contents is unreliable. Wigmore vigorously criticized the rule,²¹⁴ and McCormick pointed out "... the advent of modern discovery and related procedures under which original documents may be examined before trial rather than at it, have substantially reduced the need for the rule."²¹⁵ The thorniest best evidence problem is the recognition of excuses for non-production.²¹⁶ The modern trend in both military and civilian courts is

²⁰⁹ J.A.G. School, U.S. Army, School Text, Military Criminal Law, Evidence § 12-5 (1973).

²¹⁰ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 12 (2nd ed. 1972).

²¹¹ *Id.* at § 15. *Cf.* para. 138e, MCM, 1969.

²¹² Para. 138f(1), MCM, 1969.

²¹³ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 186 (2nd ed. 1972). The text states that:

Modern common law doctrine makes the neutral and unexciting reputation evidence the preferred type, which will usually be accepted where character evidence can come in at all, whereas the other two (opinion evidence and proof of conduct) are received only in limited and defined situations.

²¹⁴ 4 WIGMORE, EVIDENCE § 1180 (3rd ed. 1940).

²¹⁵ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 231 (2nd ed. 1972).

²¹⁶ *Id.* at §§ 237-40.

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towards recognizing a growing number of adequate excuses.²¹⁷ Some civilian courts grant the trial judge very broad discretionary power to determine whether the proponent's showing is sufficient.²¹⁸ If the defendant offers important, demonstrably reliable secondary evidence and the prosecutor objects on an illiberally strict interpretation of the jurisdiction's tests for excuses for non-production, the defense counsel should feel justified in citing *Chambers*.

(6) The hearsay rule. *Chambers* might result in a noticeable liberalization of the military and civilian hearsay doctrines. Of course, Mississippi's hearsay rule was the very first victim of *Chambers*. However, it is rather sobering for a military practitioner to realize how truly short the *Manual's* listing of hearsay exceptions is.²¹⁹ Any comparison between the *Manual* listing and the listing in the proposed Federal Rules of Evidence should persuade defense counsel that they will often be able to argue that *Chambers* requires the admission of hearsay evidence which does not fall within any exception listed in the *Manual*. When defense counsel desire to introduce reliable, critical hearsay evidence which does not fall within any of their jurisdiction's recognized hearsay exceptions, the most effective argument available to them is that *Chambers* requires the evidence's admission. It is perhaps significant that in *Chambers*, Mr. Justice Powell disregarded the prevailing, state doctrine limiting declarations against interest to statements against pecuniary or proprietary interest and relied instead upon the Federal Rules of Evidence which abolish the materialistic limitation.²²⁰ The Justice was obviously impressed by the "considerable scholarly criticism"²²¹ of the materialistic limitation; and when footnoting the criticism, he cites to the report of the Committee on Rules of Practice & Procedure on the subject of the proposed Rules of Evidence for the United States Courts and Magistrates.²²² Rules 803 and 804 of the Rules state numerous hearsay exceptions which many jurisdictions including the military have not as yet recognized: present sense impression,²²³ statements of past symptoms for purposes of medical diagnosis or treatment,²²⁴ learned treatises,²²⁵

²¹⁷ *Id.* See also FED.R.EV. 1004. Cf. para. 143a, MCM, 1969.

²¹⁸ See, e.g., FED.R.EV. 1003.

²¹⁹ *Chambers v. Mississippi*, — U.S. — (1973).

²²⁰ Paras. 139-45, MCM, 1969.

²²¹ — U.S. — (1973).

²²² *Id.*

²²³ FED.R.EV. 803(b)(1).

²²⁴ *Id.* at 803(b)(4).

²²⁵ *Id.* at 803(b)(18).

statements of recent perception,²²⁶ and statements against interest.²²⁷ Generally speaking, the federal rules lower the standards of admissibility.²²⁸ If Mr. Justice Powell's approving citation of the Federal Rules is to be interpreted as a signal from the Court that the majority of its members approve of the Rules' content, the defense counsel would be well advised to search for a Federal Rule provision justifying his evidence's admission whenever he makes a *Chambers* argument.

2. Competence Rules Based Upon External Social Policies

As of this writing, there are no decided cases invoking *Chambers* to override competence rules based on external social policies. A conservative commentator would probably be inclined to regard footnote 21 in *Washington* as conclusive proof that the Court will stop short of applying *Chambers* to statutory or common-law privileges.²²⁹ Given the present complexion of the Court, it certainly would not be unreasonable to predict that the Court will limit *Chambers*.

However, the issue is still unsettled, and defense counsel can make a persuasive argument that *Chambers* should be extended to competence rules based on external social policies. First, defense counsel can point out that footnote 21 was simply the Court's cautionary statement that it had not as yet decided whether the right to present defense evidence could override the listed privileges. Since Mr. Chief Justice Warren used the language, "Nor do we deal in this case with . . .,"²³⁰ the footnote should not be interpreted as an advisory opinion on what the Court would have done if it had dealt with that issue. Second, defense counsel can argue that whichever formulation of the right the Court adopts, no formulation requires that the Court limit *Chambers* to competence rules based upon probative dangers. Neither the due process nor the compulsory process guarantee require that the Court refuse to extend *Chambers*. Finally, defense counsel can argue that while many statutory and common-law privi-

²²⁶ *Id.* at 804(b) (2).

²²⁷ *Id.* at 804(b) (4).

²²⁸ See Imwinkelried, *The New Federal Rules of Evidence*, THE ARMY LAWYER, April 1973, at 3; Imwinkelried, *The New Federal Rules of Evidence—Part II*, THE ARMY LAWYER, May 1973, at 1; Imwinkelried, *The New Federal Rules of Evidence—Part III*, THE ARMY LAWYER, June 1973, at 1; Imwinkelried, *The New Federal Rules of Evidence—Part IV*, THE ARMY LAWYER July 1973, at 10.

²²⁹ *Washington v. Texas*, 388 U.S. 14, 23 n. 21 (1967).

²³⁰ *Id.*

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leges protect important social relationships and policies, others rest on rather insubstantial policy considerations.²³¹

The prosecution will respond that cases involving competence rules based on external social policies are distinguishable from *Chambers*. The argument would be that while a showing of the defense evidence's relevance, reliability, and criticality removes the reason for applying any competence rule based on probative danger, the showing does not remove the reason for applying a rule based on external social policy: while the showing might make it indefensible to apply the hearsay doctrine, the showing in no way alters the undesirable effect of the evidence's admission on underlying social policy. Whether or not the evidence is reliable, the admission of evidence of a confidential communication between an attorney and his client still interferes with the policy of protecting that privileged relationship.

The defense response to this attempt to distinguish *Chambers* would be that the attempt proves only that *Chambers* would have to be applied to competence rules based on social policy in a different manner. When applying *Chambers* to a competence rule based upon probative danger, the military judge need analyze only the evidence's relevance, reliability, and importance to determine whether it would be arbitrary to apply the competence rule to exclude the evidence. When the judge is applying *Chambers* to a competence rule based upon social policy, he must take an additional step in his analysis. If he concludes that the evidence is sufficiently relevant, reliable, and critical, he must then balance the defendant's interest in a fair trial against the Government's interest in effectuating the social policy. *Roviaro v. United States*²³² strongly suggests that this argument will prevail. In *Roviaro*, the defendant sought disclosure of the name of the police informer who was a witness to the alleged offense. The Supreme Court held that the defendant was entitled to disclosure. The Court recognized that most courts treated an informer's identity as privileged because the privilege fostered the social policy of encouraging citizens to report offenses to the police. However, the

²³¹ C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 77 (2nd ed. 1972) states that:

Unfortunately the justifiable demands of privacy and confidence have on more than one occasion been diverted to serve the purposes of politically powerful groups seeking the convenience and prestige of a professionally-based privilege. Whether in a given situation a privilege is justified calls for a balancing of values not likely to be achieved by those interested in the result.

²³² 353 U.S. 53 (1957).

Court concluded that the disclosure was relevant and critical to the defendant's case on the merits. In other words, the Court balanced the defendant's interest in a fair trial against the external social policy. In *Roviaro*, the Court employed the type of balancing test necessary to apply *Chambers* to the second type of competence rule. Footnote 21 notwithstanding, *Roviaro* augurs the application of Chambers to competence rules based on external social policies.

B. THE BREADTH OF THE APPLICATIONS

After perusing *Chambers*, the reader's initial impression might be that Mr. Justice Powell held that it is unconstitutional to refuse to permit the defendant to invoke the declaration against penal interest exception. A superficial reading of the opinion might lead one to conclude that the opinion requires that trial judges permit defendants to invoke the class exception. However, a closer reading of the opinion should dispel that impression. The Court dealt only with the trial judge's refusal to permit the defendant to invoke the exception in that case's peculiar factual setting. The closing sentence of Mr. Justice Powell's opinion narrowly defines his holding: "Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial."²³³ Despite the Justice's extensive criticism of the materialistic limitation on the declaration against interest exception, his opinion does not require that all courts now apply the declaration against penal interest exception in all cases.

In future applications of *Chambers*, the Court will probably continue to adjudicate on a case-by-case basis rather than mandating that the lower courts apply generic rules of admissibility. This approach would be consistent with the approach the Court has taken in confrontation clause cases. In *Dutton v. Evans*,²³⁴ the defendant raised a confrontation objection to the admission of hearsay under Georgia's liberal accomplice exception to the hearsay rule. The Court rejected the contention that the evidence's admission denied the defendant confrontation. The Court refrained from holding that the class accomplice exception does not violate the confrontation clause. Rather, the Court analyzed the reliability of the evidence admitted and concluded that the founda-

²³³ *Chambers v. Mississippi*, — U.S. — (1973) ..

²³⁴ 400 U.S. 74 (1970).

DEFENSE EVIDENCE

tional evidence gave the trier of fact "... a satisfactory basis for evaluating the truth of the prior statement."²³⁵ Most lower courts have interpreted *Dutton* as requiring a case-by-case examination of the constitutionality of the application of any hearsay exception.²³⁶ Hence, the Court adjudicates confrontation issues on a case-by-case examination rather than validating class hearsay exceptions. Similarly, the Court will probably adjudicate *Chambers* issues on a case-by-case basis rather than invalidating class competence rules.²³⁷

IV. CONCLUSION

In retrospect, it is quite surprising that defense counsel waited so long to launch a constitutional attack on evidentiary rules excluding defense evidence. There are three fields of law which directly impact the criminal trial: substantive crimes and defenses, procedure, and evidence. Defense counsel have eagerly mounted constitutional attacks on rules of substantive criminal responsibility,²³⁸ and they have likewise attacked procedural rules which disadvantaged their clients.²³⁹ Yet, until very recently, defense counsel seemed to regard evidentiary rules as sacrosanct. *Washington* and *Chambers* should disabuse defense counsel of the myth that evidentiary competence rules are unassailable.

Since *Chambers* will certainly benefit defendants, some of the Burger Court's critics may caustically remark that the decision is out of the Court's character. However, the remark reflects a misunderstanding of the central thrust of the Burger Court's decisions. History will undoubtedly judge that the Warren Court cleansed the criminal process of many intolerable abuses such as gross violations of privacy²⁴⁰ and third-degree interrogation

²³⁵ *Id.* at 89.

²³⁶ See, e.g., *United States v. Adams*, 446 F.2d 681 (9th Cir. 1971), cert. denied, 404 U.S. 943 (1971). But see *United States v. Clayton*, 450 F.2d 16 (1st Cir. 1971).

²³⁷ But see *Commonwealth v. Hackett*, 13 Cr.L. 2321 (Pa. Super.Ct. June 14, 1973). The Superior Court noted that the Supreme Court had strictly limited its holding to the precise facts before it. 13 Cr. L. 1058. However, the Superior Court decided to adopt a general rule admitting third party's confessions to the offense the accused is charged with. The Superior Court felt that such a rule would give trial judges more definite guidance. *Id.*

²³⁸ For example, counsel have long argued that the first amendment limits legislatures' power to proscribe expressive activity. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927); *Schenck v. United States*, 249 U.S. 47 (1919).

²³⁹ See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884).

²⁴⁰ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

techniques.²⁴¹ But it is equally clear that the Warren Court promulgated rules which resulted in a suppression of the truth. The Burger Court is attempting to redesign the criminal process as an instrument for discovering the truth, and it is redesigning the process in an even-handed fashion. The Burger Court's two recent discovery decisions exemplify the Court's efforts. In *Williams v. Florida*,²⁴² the Court upheld a Florida rule of criminal procedure that a defendant relying upon an alibi defense must give the prosecutor advance notice of the names and addresses of the alibi witnesses. As Mr. Justice White noted, the rule was "... designed to enhance the search for truth in the criminal trial. . . ." ²⁴³ More recently, in *Wardius v. Oregon*,²⁴⁴ the Court amplified on *Williams*. The Court held that notice-of-alibi statutes must grant the defendant reciprocal discovery. Speaking for the Court, Mr. Justice Marshall cited Mr. Justice Brennan's article, aptly entitled, "The Criminal Prosecution: Sporting Event or Quest for Truth," ²⁴⁵ The Court's evidentiary decisions parallel its discovery decisions. In cases such as *Dutton* and *Griffin v. California*,²⁴⁶ the Court has permitted jurisdictions to lower the standards of admissibility for prosecution evidence. *Chambers* represents the Court's attempt to balance the evidentiary scales. True to Professor McCormick's prediction, the Burger Court is fulfilling the manifest destiny of the law of evidence; the Court is progressively lowering the barriers to truth in the criminal process.²⁴⁷

EDWARD J. IMWINKELRIED**

²⁴¹ See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936).

²⁴² 399 U.S. 78 (1970).

²⁴³ *Id.* at 82.

²⁴⁴ 13 Cr.L. 3141 (June 11, 1973).

²⁴⁵ *Id.* at 3142.

²⁴⁶ 399 U.S. 149 (1970). The Court sustained a California Evidence Code provision to the effect that if evidence was admissible as a prior inconsistent statement, it was admissible as substantive evidence.

²⁴⁷ In the main, the proposed Federal Rules of Evidence would lower standards of admissibility. See Imwinkelried, *The New Federal Rules of Evidence—Part IV*, THE ARMY LAWYER July 1973, at 10, 14-15.

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* Mention of a work in this Section does not preclude later review in the *Military Law Review*.

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